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Criminal Procedure in Pennsylvania: The Pre-Trial Issues in Four Parts

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Criminal Procedure in Pennsylvania: The Pre-Trial Issues in Four Parts

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TABLE OF CONTENTS

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Before a criminal trial begins, the state must defend its right to use almost every piece of evidence and even to commence proceedings. Was the defendant properly questioned? Was the evidence properly seized? Did the victim make a valid identifica-

tion? Can the case be retried? Ever since 1961, pre-trial litigation of these questions has often determined trial result.

This article is presented in four parts, synopsizing the current state of the law in Pennsylvania on the issues of confessions, search and seizure, identifications and double jeopardy. This review is not intended to detail the answers but only to allow a general understanding of the questions and to provide guidance for further research.

Part I—Confessions

I. Introduction

Prior to 1964, the principal test for the admissibility of a defendant's statement was whether it was "voluntary". A confession was inadmissible then only if it was "coerced"—not the product of a rational intellect or a free will but rather the result of overbearing.[1] Voluntariness was determined by the "totality of the circumstances."[2]

In 1964, the United States Supreme Court in *Escobedo v. Illinois*[3] held that a confession taken from a suspect when the investigation had "focused" on him as the accused was inadmissible if (1) he requests an attorney and is denied an opportunity to consult with one or (2) he is not warned of his right to remain silent.

Two years later, the United States Supreme Court extended *Escobedo* in *Miranda v. Arizona*.[4] Generally *Miranda* holds that, unless certain specified procedures are followed, statements by a defendant must be excluded regardless of the fact that the statements might have been voluntary under prior standards.[5]

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1. Townsend v. Sain, 372 U.S. 293, 307 (1963); Rogers v. Richmond, 365 U.S. 534 (1961); Columbe v. Connecticut, 367 U.S. 568 (1961).
2. Fikes v. Alabama, 352 U.S. 191 (1957); Commonwealth *ex rel.* Gaito v. Maroney, 422 Pa. 171, 220 A.2d 628 (1966).
3. Escobedo v. Illinois, 378 U.S. 478 (1964).
4. Miranda v. Arizona, 384 U.S. 436 (1966).
5. Neither *Escobedo* nor *Miranda* are applicable to cases in which the *trial was commenced prior to those decisions.* Thus for trials prior to June 22, 1964, the old "voluntariness standards" are applicable. For trials between June 22, 1964, and June 13, 1966, *Escobedo* standards are applicable. For trials after June 13, 1966, *Miranda* standards are applicable. Johnson v. New Jersey, 384 U.S. 719 (1966). *Miranda* and *Escobedo* are also inapplicable to *retrials* when the original trial commenced prior to those decisions. Jenkins v. Delaware, 395 U.S. 213 (1969).

The test of "voluntariness" is the proper standard for pre-*Miranda* and *Escobedo cases.* In considering the "totality of the circumstances," one factor is the lack of *Miranda* warnings. It is one factor, among others, to be considered in evaluating the voluntariness of a pre-*Miranda* or pre-*Escobedo* statement. Darwin v. Connecticut, 391 U.S. 346 (1968); Davis v. North Carolina, 384 U.S. 737 (1966).

Specifically, the *Miranda* holding can be detailed as follows:

Scope:

The prosecution may not use statements, whether *exculpatory* or *inculpatory*, stemming from *custodial interrogation* of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been *taken into custody* or *otherwise deprived of his liberty in any significant way.*[6]

Warnings:

Prior to any questioning, the person must be warned (1) that he has a right to remain silent, (2) that any statement he does make may be used as evidence against him, and (3) that he has a right to the presence of an attorney, either retained or appointed.[7]

Waiver:

The defendant may waive effectuation of these rights provided the waiver is made voluntarily, knowingly, and intelligently. If, however, he *indicates* in any manner and at any stage of the process that *he wishes to consult with an attorney* before speaking there can be *no questioning.* Likewise, if the individual is alone and *indicates* in any manner that he does *not wish to be interrogated,* the police may *not question him.* The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned.[8]

II. Requirement of Warnings

A. *Custody*

Miranda requires warnings and a waiver when there is "custodial interrogation"—"after a person has been taken into custody or deprived of his freedom of action in any significant way."[9]

Several courts have held that Johnson v. New Jersey means *Miranda* standards apply only to post-*Miranda statements* rather than post-*Miranda* trials. However, the Pennsylvania Supreme Court has indicated that *Johnson* holds that *Miranda* applies to trials commenced after the date of Miranda regardless of the time of the statement. Commonwealth v. Ware, 446 Pa. 52, 284 A.2d 700 (1971). Certiorari was denied by the United States Supreme Court on April 24, 1972. Pennsylvania v. Ware, 405 U.S. 987 (1972). *See also,* Commonwealth v. Romberger, 454 Pa. 279, 312 A.2d 353 (1973).

6. Miranda v. Arizona, 384 U.S. 436, 444 (1966).
7. *Id.* at 444.
8. *Id.* at 444-45.
9. In a footnote, the Supreme Court stated that "custody" and "deprived of freedom of action" is "what we meant in *Escobedo* when we spoke of an investigation which had focused on an accused." Miranda v. Arizona, 384 U.S. 436, 444 n.4 (1966). In Commonwealth v. D'Nicuola, 448 Pa. 54, 292 A.2d 333 (1972), the Pennsylvania Supreme Court held that warnings are required under *Miranda* when an individual is in custody

What constitutes custodial interrogation must be approached on a case by case basis.[10] The circumstances to be weighed include the information possessed by the police and their actions. In the absence of a formal arrest, something must be said or done by the authorities which indicates that they would not have allowed a defendant to depart.[11] If the police questioning occurs in an atmosphere or under circumstances which leave the individual no freedom of choice and which are inherently coercive, there is "custodial interrogation."[12]

The test is an objective one. Custody occurs when a suspect is led to believe, *as a reasonable person*, that he is being deprived or restricted of his freedom of action under official authority.[13] Custody does *not* depend on the subjective intent of the police but rather whether the suspect is physically deprived of his freedom of action or is placed in a situation in which he could reasonably believe that his freedom of action or movement is restricted. As the test is an objective one, and not what is in the mind of the police officer, police attempts to inform a person of his rights do not convert an otherwise non-custodial situation into a custodial one. The mere giving of abbreviated warnings does not *per se* indicate custody and thus a need for any warnings at all.[14]

Custodial interrogation is not limited to police station questioning or questioning after formal arrest.[15] The factors to be considered are the place, time, sequence, scope and circumstances of the interview.

Place—Generally, even innocent questions asked in an inherently coercive atmosphere of a police station create an objective impression of deprivation of freedom of action and thus require warnings.[16] However, police station interviews are not *per se* cus-

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or is the focus of an investigation. *DiNicuola* involved a hospitalized defendant, not really free to leave or to eject the police.

10. United States v. Clark, 425 F.2d 827 (3d Cir. 1970).

11. *See* Commonwealth v. Ross, 452 Pa. 500, 307 A.2d 898 (1973). It is immaterial that if the person had attempted to flee, thereby furnishing additional evidence of guilt, the officers would have restrained him. United States v. Hall, 421 F.2d 540 (2d Cir. 1969).

12. Commonwealth v. Banks, 429 Pa. 53, 59, 239 A.2d 416 (1968).

13. Commonwealth v. Marabel, 445 Pa. 435, 283 A.2d 285 (1971).

14. United States v. Akin, 435 F.2d 1011 (5th Cir. 1970). *See* Commonwealth v. Ross, 452 Pa. 500, 307 A.2d 898 (1973).

15. Commonwealth v. Jefferson, 423 Pa. 541, 226 A.2d 765 (1967).

16. Commonwealth v. Marabel, 445 Pa. 435, 283 A.2d 285 (1971); Commonwealth v. Bennett, 439 Pa. 34, 264 A.2d 706 (1970). *See* Proctor v. United States, 404 F.2d 819 (D.C. Cir. 1968); Commonwealth v. Romberger, 454 Pa. 279, 312 A.2d 353 (1973).

todial.[17] Whether or not an individual in fact voluntarily goes to the station, can leave at any time, and thus is not in custody, often depends on whether he is a suspect with the investigation focused on him.[18] Similarly, if one is in jail, he is in custody for the purposes of any interrogation, whether related to the offense for which he is incarcerated or not.[19]

On the other end, questioning at the private home of a suspect or friend of the suspect is not custodial,[20] unless an investigation is focused or other indicia of arrest are apparent.[21] . Similarly, routine, on-the-scene questioning is not considered custodial.[22] It is an essential police tool to resolve problems by immediate investigation.[23] Police may question by-standers, including even a suspect, at the scene of an offense, as to the facts of the offense.[24] The issue is closely tied to focus and voluntariness. Routine questioning is proper. Detailed extensive investigation is not.[25]

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17. For example, if an individual voluntarily goes to the police station and answers questions, as a witness, the interview process is often considered non-custodial. *See* Clark v. United States, 400 F.2d 83 (9th Cir. 1968); People v. Yukl, 25 N.Y.2d 585, 256 N.E.2d 172, 307 N.Y.S.2d 857 (1969).

18. *See* United States v. Manglona, 414 F.2d 642 (9th Cir. 1969); United States v. Pierce, 397 F.2d 128 (4th Cir. 1968); United States v. Bird, 293 F. Supp. 1265 (D. Mont. 1968); United States v. Harrison, 265 F. Supp. 660 (S.D.N.Y. 1967).

19. Mathis v. United States, 391 U.S. 1 (1968); *see* Commonwealth v. Simala, 434 Pa. 219, 252 A.2d 575 (1969). Questioning of a defendant in a hospital, where he is not really free to leave or to eject the police, is similar to "official detention" and would indicate custody. Commonwealth v. D'Nicoula, 448 Pa. 54, 292 A.2d 333 (1972).

20. Virgin Islands v. Berne, 412 F.2d 1055 (3d Cir. 1969); Commonwealth v. Eperjesi, 423 Pa. 455, 224 A.2d 216 (1966); Commonwealth v. Barclay, 212 Pa. Super. 25, 240 A.2d 838 (1968). *See also* Commonwealth v. Ross, 452 Pa. 500, 307 A.2d 898 (1973).

21. Physical restraint is a significant factor in determining whether a person is in custody. The fact that he is in handcuffs leads to a logical conclusion of custody and thus the need for warnings. Commonwealth v. Moody, 429 Pa. 39, 239 A.2d 409 (1968). Other factors include persistent questioning, large numbers of police, and police control of the situation. Orozco v. Texas, 394 U.S. 324 (1969); United States v. Bekowies, 432 F.2d 8 (9th Cir. 1970); Commonwealth v. Sites, 427 Pa. 486, 235 A.2d 387 (1967).

22. As stated in *Miranda*, "General on the scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact finding process is not affected by [*Miranda* requirements] . . . . In such situations the compelling atmosphere inherent in the process of in custody interrogation is not necessarily present." 384 U.S. 436, 447-78.

23. Commonwealth v. Thomas, 448 Pa. 42, 292 A.2d 352 (1972); Commonwealth v. Freeman, 438 Pa. 1, 263 A.2d 403 (1970); Commonwealth v. Bordner, 432 Pa. 405, 247 A.2d 612 (1968). *See* Lowe v. United States, 407 F.2d 1391 (9th Cir. 1969).

24. Commonwealth v. Lopinson, 427 Pa. 284, 234 A.2d 552 (1967), *rev'd on other grounds*, 392 U.S. 647 (1968). *See* Allen v. United States, 390 F.2d 476 (D.C. Cir. 1968); Arnold v. United States, 382 F.2d 4 (9th Cir. 1967).

25. United States v. Cobb, 449 F.2d 1145 (D.C. Cir. 1971); Commonwealth v. McKinnon, 443 Pa. 183, 278 A.2d 878 (1971). Similarly, informational questioning of a defendant, prior to actual formal arrest, may be admissible without warnings. Arrest and extensive detention and questioning at the scene is not. *See* Allen v. United States, 404 F.2d 1335 (D.C. Cir. 1968).

Included within the on-scene questioning exception is the traffic stop situation. Generally, the questioning of a driver of a stopped car is not considered custodial.[26] Similarly, incidental detention to check a stolen car registration does not amount to custody.[27] Such stops are routine, and any incidental questioning as to cards, identity and papers does not require warnings.[28] Of course, once an offense, other than a minor traffic violation, is uncovered, and the defendant is either arrested or restrained, detailed questioning must be preceded by warnings and a waiver.[29]

Time—Generally questioning in the daylight is more likely to be considered non-custodial than questioning in the late night or early evening.[30]

Persons Present—Miranda speaks of being "cut off from the outside world."[31] Thus, the presence of family or friends may be a significant factor to show that no custody exists.[32] On the other hand, removal of a defendant from family or friends is a strong indication of custody.[33]

A large number of police compared to civilians may indicate custody.[34] And one police officer, among numerous civilians is a strong indication of no custody.[35]

Nature of Questioning—Short investigative questions such as "what happened?, who did it?, what are you doing here?" are generally considered non-custodial.[36] Such routine questioning is proper even during a stop and frisk. Temporary detention under suspi-

26. Lowe v. United States, 407 F.2d 1391 (9th Cir. 1969).
27. Allen v. United States, 390 F.2d 476 (D.C. Cir. 1968).
28. United States v. Jackson, 448 F.2d 963 (9th Cir. 1971); United States v. LeQuire, 424 F.2d 341 (5th Cir. 1970); United States v. Breen, 419 F.2d 806 (6th Cir. 1969); United States v. Montez-Hernandez, 291 F. Supp. 712 (E.D. Cal. 1968); State v. Stafford, 6 Conn. Cir. 613, 281 A.2d 827 (1971).
29. *See* Bendelow v. United States, 418 F.2d 42 (5th Cir. 1969); Agius v. United States, 413 F.2d 915 (5th Cir. 1969).
30. Orozco v. Texas, 394 U.S. 324 (1969).
31. 384 U.S. 436, 445.
32. United States v. Owens, 431 F.2d 349 (5th Cir. 1970); United States v. Hall, 421 F.2d 540 (2d Cir. 1969); Commonwealth v. Barclay, 212 Pa. Super. 25, 240 A.2d 838 (1968).
33. Pemberton v. Peyton, 288 F. Supp. 920 (E.D. Va. 1968); Commonwealth v. Sites, 427 Pa. 486, 235 A.2d 387 (1967).
34. Orozco v. Texas, 394 U.S. 324 (1969).
35. People v. Robinson, 22 Mich. App. 124, 177 N.W.2d 234 (1970).
36. Virgin Islands v. Berne, 412 F.2d 1055 (3d Cir. 1969); Allen v. United States, 390 F.2d 476 (D.C. Cir. 1968); Commonwealth v. Frazier, 443 Pa. 178, 279 A.2d 33 (1971); Commonwealth v. Freeman, 438 Pa. 1, 263 A.2d 403 (1970); Commonwealth v. Bordner, 432 Pa. 405, 247 A.2d 612 (1968). But questions such as "What did you stab her with?" indicate focus and require warnings and a waiver. Commonwealth v. Brittain, Pa. , A.2d (1974).

cious circumstances does not indicate custody.[37]

B. *Interrogator*

Generally, a suspect who makes damaging admissions in response to citizen interrogation need not be warned. *Miranda* itself speaks only of "questioning by law enforcement officers."[38] Who is or is not a law enforcement officer depends on the facts of the situation. Clearly a private citizen, acting without police authority or control, is not one.[39] On the other hand, if police use a private citizen as their agent, this *is* "police questioning," requiring warnings.[40]

Official government agents acting in their official capacity must give warnings.[41] Semi-official agents, such as railroad detectives, bank guards, and foreign police officers do not need to warn.[42] Of course, if such agents have local police authority and are thus, in fact, "police," *Miranda* warnings are required.

If a suspect does not consider himself or know he is speaking to a policeman, he can hardly be said to believe he is in "custody." Thus, unsolicited discussions with prison guards need not be preceded or interrupted by warnings.[43] Conversations with undercover agents, whether in the home or even in jail, are voluntary admissions. Misplaced reliance is not coercion.[44]

C. *"Questioning"—Volunteer and Spontaneous Statements*

Miranda states that "volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding."[45] A volunteered statement is one that is *not* made in response to police questioning. An accused has the right to remain silent unless he chooses to speak in the "unfettered exercise of his own free will."[46]

A man who calls or goes to the police and blurts out a statement is not covered by *Miranda*.[47] Similarly, spontaneous state-

37. Lowe v. United States, 407 F.2d 1391 (9th Cir. 1969); United States v. Thomas, 396 F.2d 310 (2d Cir. 1968); People v. Manis, 268 Cal. App. 2d 653, 74 Cal. Rptr. 423 (1969).

38. 384 U.S. 436, 444 (1966).

39. Yates v. United States, 384 F.2d 586 (5th Cir. 1967).

40. United States v. Birnstihl, 441 F.2d 368 (9th Cir. 1971); United States v. Antonelli, 434 F.2d 335 (2d Cir. 1970); Commonwealth v. Bordner, 432 Pa. 405, 247 A.2d 612 (1968).

41. Commonwealth v. Simala, 434 Pa. 219, 252 A.2d 575 (1969).

42. United States v. Birnstihl, 441 F.2d 368 (9th Cir. 1971); United States v. Antonelli, 434 F.2d 335 (2d Cir. 1970).

43. Commonwealth v. DuVal, 453 Pa. 205, 307 A.2d 229 (1972); Commonwealth v. Mozillo, 443 Pa. 171, 278 A.2d 874 (1971).

44. Hoffa v. United States, 385 U.S. 293 (1966); United States v. Fioranti, 412 F.2d 407 (3d Cir.), *cert. denied*, 396 U.S. 837 (1969).

45. 384 U.S. 436, 478 (1966).

46. Commonwealth v. Leaming, 432 Pa. 326, 247 A.2d 590 (1968).

47. Miranda v. Arizona, 384 U.S. 436, 478 (1966); Commonwealth v.

ments made upon and in response to arrest, without questioning, are "volunteered."[48]

Even after a defendant is in custody, if he blurts out a statement, not in response to police questioning, the lack of warnings is irrelevant.[49] Moreover, the police are permitted to ask certain administrative questions, such as age, residence, schooling, or to inquire as to whether a defendant wishes to waive his rights, and if a defendant spontaneously admits his guilt, the statement is "volunteered."[50] Similarly, observations as to a suspect's status are not questioning and responses may still be considered volunteered.[51]

The fact that a suspect has surrendered does not mean an automatic waiver of rights. If he is interrogated, the warnings and a waiver are required if a subsequent statement is to be admissible.[52] However, even if a defendant initially chooses to remain silent, a subsequently volunteered statement is admissible—absent trickery or deception by the police.[53]

Confessions must be truly volunteered. A statement resulting from a pre-arranged confrontation with a co-defendant is not "volunteered."[54] Such a statement is proper only if there are warnings and a waiver. It is then still in response to a stimulus but after full and complete knowledge of one's rights.[55] Similarly, "administrative" questioning must be clearly that and not applied to encourage or elicit incriminating statements.[56]

Ross, 452 Pa. 500, 307 A.2d 898 (1973); Commonwealth v. Freeman, 438 Pa. 1, 263 A.2d 403 (1970); Commonwealth *ex rel.* Vanderpoll v. Russell, 426 Pa. 499, 233 A.2d 246 (1967).

48. Commonwealth v. Sullivan, 450 Pa. 273, 299 A.2d 608 (1973) ("I was going to give myself up in the morning anyhow.").

49. Commonwealth v. Sullivan, 450 Pa. 273, 299 A.2d 608 (1973); Commonwealth v. Koch, 446 Pa. 469, 288 A.2d 791 (1972); Commonwealth v. Mozillo, 443 Pa. 171, 278 A.2d 874 (1971); Commonwealth v. Brown, 438 Pa. 52, 265 A.2d 101 (1970). *See also*, Commonwealth v. Ross, 452 Pa. 500, 307 A.2d 898 (1973).

50. *Compare* Commonwealth v. Clark, 453 Pa. 449, 309 A.2d 589 (1973) (warnings interrupted-volunteered) and Commonwealth v. DuVal, 453 Pa. 205, 307 A.2d 229 (1973) (administrative-volunteered) *with* Commonwealth v. Youngblood, 453 Pa. 225, 307 A.2d 922 (1973) (not volunteered).

51. Commonwealth v. Brown, 438 Pa. 52, 265 A.2d 101 (1970) ("He's in bad shape," "You are going to jail."). But inquiries as to evidence or guilt are considered "questioning." Commonwealth v. Brittain, Pa. , A.2d (1974).

52. Commonwealth v. Nathan, 445 Pa. 470, 285 A.2d 175 (1971); Commonwealth v. Yount, 435 Pa. 276, 256 A.2d 464 (1969).

53. Commonwealth v. Franklin, 438 Pa. 411, 265 A.2d 361 (1970).

54. Commonwealth v. Mercier, 451 Pa. 211, 302 A.2d 337 (1973); Commonwealth v. Hamilton, 445 Pa. 292, 285 A.2d 172 (1971).

55. *See, e.g.*, Commonwealth v. Moore, 443 Pa. 364, 279 A.2d 179 (1973), *with* Commonwealth v. Youngblood, 453 Pa. 225, 307 A.2d 922 (1971).

56. *Compare* Commonwealth v. DuVal, 453 Pa. 205, 307 A.2d 229 (1973), and Commonwealth v. Brittain, Pa. , A.2d (1974).

Once a defendant exercises his *Miranda* rights, almost any stimulus, if state-induced will negate a finding of a "volunteered" statement.[57] A heavy burden is placed on the police to show that state-statements were blurted out before there was an opportunity to warn.[58]

If a volunteered statement is begun, the police have no obligation to interrupt and warn.[59] However, if merely an indication of a desire to give a statement is shown, there must be warnings and a waiver.[60] If a defendant stops his volunteered statement, warnings and a waiver are required before any questioning in depth.[61]

III. The Miranda Warnings

A. *Scope*

Standard warnings, which must be given prior to interrogation,[62] must caution of the:

1) right to silence;

2) use of statements given by suspect against him in court;

3) right to have lawyer before answering questions and while being asked questions;

4) right to have lawyer provided free of charge.[63]

The warnings are not a ritual of set words. So long as the meaning of the rights is adequately conveyed and the message is clear, it is sufficient.[64]

It is *proper* to warn a defendant that his statement "might", "may", "can", or "could" be *used against him.* "Will" is not essential wording.[65] However, it is *improper* to warn a defendant that

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57. *See* Commonwealth v. Mercier, 451 Pa. 211, 302 A.2d 337 (1973); Commonwealth v. Hamilton, 445 Pa. 292, 285 A.2d 172 (1971).

58. Commonwealth v. Youngblood, 453 Pa. 225, 307 A.2d 922 (1973).

59. Miranda v. Arizona, 384 U.S. 436, 478 (1966).

60. Commonwealth v. Youngblood, 453 Pa. 225, 307 A.2d 922 (1973).

61. *See, e.g.,* Commonwealth v. Cooper, 444 Pa. 122, 297 A.2d 108 (1971).

62. Commonwealth v. Darden, 441 Pa. 41, 271 A.2d 257 (1970).

63. In Philadelphia, these warnings are found on the standard police questioning card and Form 75 Misc. 3. They have been repeatedly approved by the Pennsylvania courts. Commonwealth v. Ponton, 450 Pa. 40, 299 A.2d 634 (1973); Commonwealth v. Franklin, 438 Pa. 411, 265 A.2d 361 (1970); Commonwealth v. Murphy, 219 Pa. Super. 459, 281 A.2d 685 (1971). The Philadelphia card also indicates a warning that a defendant has a right to stop giving a statement at any time; such a warning is not required. People v. Washington, 115 Ill. App. 2d 318, 253 N.E.2d 677 (1971); People v. Smith, 30 Mich. App. 34, 186 N.W.2d 61 (1971); Green v. State, 451 S.W.2d 547 (Mo. 1971). *See* Commonwealth v. Murphy, 219 Pa. Super. 459, 281 A.2d 685 (1971).

64. United States v. Sanchez, 422 F.2d 1198 (2d Cir. 1970); Green v. United States, 386 F.2d 953, 956 (10th Cir. 1967); Coyote v. United States, 380 F.2d 305, 308 (10th Cir. 1967); Commonwealth v. Baker, 214 Pa. Super. 27, 251 A.2d 737 (1969).

65. Davis v. United States, 425 F.2d 673 (9th Cir. 1970) ("can"); United States v. Grady, 423 F.2d 1091 (5th Cir. 1970) ("can"); United

a settlement might be used "for or against him."[66] Such a deficiency undercuts "clear conveyance of the negative impact at trial of a statement."[67]

Defendants must be told in sufficiently clear language of their *right to counsel, free of charge*, before answering any questions. The issue is solely whether a defendant was aware of his right to free counsel.[68] Merely telling him that he has a right to an attorney and that the police would get one for him does not convey the right to free counsel in his own behalf and for his own representation.[69] Telling him that a lawyer will be appointed for him if he can't afford one does convey the right.[70] Even if the police know that a defendant is aware of his rights, can afford counsel, or has a specific counsel, the better practice is to still warn him.[71] The state has a high burden to prove knowledge or non-indigence.[72]

There is no need to warn a defendant of the possible *collateral consequences* of his statement. Thus he need not be told of the applicability of the felony-murder doctrine,[73] of his right to challenge a prior search and seizure,[74] or of the possible use of his statement in a different jurisdiction.[75]

There is no need to tell a defendant that his *oral statement* can be used against him. The general warning that "anything you say" can be used is sufficient.[76] There is no need to warn a juvenile suspect that he can have his parents or other mature presons present, although it is a significant factor going to the va-

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States v. Sanchez, 422 F.2d 1198 (2d Cir. 1970) ("could"). *See* Commonwealth v. Singleton, 439 Pa. 185, 266 A.2d 753 (1970) ("may"); Commonwealth v. Baker, 214 Pa. Super. 27, 251 A.2d 737 (1969) ("can").

66. Commonwealth v. Davis, 440 Pa. 123, 270 A.2d 199 (1970); Commonwealth v. Singleton, 439 Pa. 185, 266 A.2d 753 (1970).

67. Commonwealth v. Singleton, 439 Pa. 185, 266 A.2d 753 (1970).

68. Commonwealth v. Scoggins, 451 Pa. 472, 304 A.2d 102 (1973).

69. Commonwealth v. Marsh, 440 Pa. 590, 271 A.2d 481 (1970).

70. Commonwealth v. Swint, 450 Pa. 54, 296 A.2d 777 (1972); Commonwealth v. Wood & Utley, 219 Pa. Super. 35, 275 A.2d 859 (1971). Similarly, telling him that if he can not afford counsel, no questions will be asked until a lawyer is provided for him also conveys the right to free counsel. Commonwealth v. Jordon, 451 Pa. 275, 301 A.2d 667 (1973); Commonwealth v. Ponton, 450 Pa. 40, 299 A.2d 634 (1972).

71. Commonwealth v. Romberger, 454 Pa. 279, 312 A.2d 353 (1973); Commonwealth v. Yount, 435 Pa. 276, 256 A.2d 464 (1969).

72. Commonwealth v. Romberger, 454 Pa. 279, 312 A.2d 353 (1973); Commonwealth v. Yount, 435 Pa. 276, 256 A.2d 464 (1969).

73. State v. McCrae, 276 N.C. 308, 172 S.E.2d 37 (1970); Commonwealth v. McKinney, 453 Pa. 10, 306 A.2d 305 (1973).

74. United States v. Singleton, 439 F.2d 381 (3d Cir. 1971).

75. United States v. Scott, 460 F.2d 45 (3d Cir. 1972).

76. United States v. McQueen, 458 F.2d 1049 (3d Cir. 1972); United States v. Ruth, 394 F.2d 134 (3d Cir. 1968).

lidity of the waiver that parents or other mature persons were contacted or present.[77]

It is necessary to convey to a defendant the *nature of the charges* against him.[78] However, it is not necessary to specifically inform him of the exact crime being investigated.[79] So long as the suspect is made aware of the reason he is being questioned, a waiver of *Miranda* rights may be intelligently made.[80]

B. *Particular Suspects*

Warnings must be given so as to be *understood* by a defendant. Thus, if a defendant cannot understand English, it must be given in the language he understands.[81]

The warnings are prophylactic in nature and *Miranda* itself notes that it is always better to give warnings—no matter who the suspect is or what he says.[82] Even if a citizen indicates he knows his rights, the officer should still continue the warnings.[83] While particularized knowledge as indicated by phrases such as "I know I can get a free lawyer" or "I know I don't have to talk," might be sufficient,[84] such talk could be interpreted as mere "braggadocio" and without validity as proof of knowledge of rights.[85] In fact, failure to warn a police officer or even a lawyer will ordinarily result in suppression of his statement.[86]

If an attorney stays with his client during questioning, there is no need for warnings. "The presence of counsel is an adequate protective device."[87] However, the mere fact that a suspect talked with or was surrendered by a lawyer, who was not present at the time of questioning, does not mean that the suspect knew

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77. *In re* Geiger, 454 Pa. 51, 309 A.2d 559 (1973); Commonwealth v. Fogan, 449 Pa. 552, 296 A.2d 755 (1972); Commonwealth v. Moses, 446 Pa. 350, 287 A.2d 131 (1971).

78. Commonwealth v. Collins, 440 Pa. 368, 269 A.2d 882 (1970).

79. Commonwealth v. Cooper, 444 Pa. 122, 278 A.2d 895 (1971).

80. Commonwealth v. Jacobs, 445 Pa. 364, 284 A.2d 717 (1971).

81. United States v. Trabucco, 424 F.2d 1311 (5th Cir. 1970); DeLaFe v. United States, 413 F.2d 543 (5th Cir. 1969); Commonwealth v. Vasquez, 18 Chester 163 (Pa. C.P. 1969). In Philadelphia, Spanish speaking police officers give Spanish warnings. Moreover, there is a Spanish warning card, with an accurate translation of the warnings which has been upheld in numerous suppression hearings.

82. Miranda v. Arizona, 384 U.S. 436, 468-69 (1966); Commonwealth v. Romberger, 454 Pa. 279, 312 A.2d 353 (1973); *see* Commonwealth v. Cohen, 221 Pa. Super. 244, 289 A.2d 96 (1972).

83. Brown v. Heyd, 277 F. Supp. 899 (E.D. La. 1967); Commonwealth v. Sites, 427 Pa. 486, 235 A.2d 387 (1967).

84. *See* Kear v. United States, 369 F.2d 78 (9th Cir. 1966).

85. Commonwealth v. Romberger, 454 Pa. 279, 312 A.2d 353 (1973).

86. United States v. Millen, 338 F. Supp. 747 (E.D. Wis. 1972); Commonwealth v. Cohen, 221 Pa. Super. 244, 289 A.2d 96 (1972); Commonwealth v. Schwartz, 210 Pa. Super. 360, 233 A.2d 904 (1967).

87. Miranda v. Arizona, 384 U.S. 436, 466 (1966). *See* United States v. Jackson, 390 F.2d 317 (2d Cir. 1968).

of his rights. Proof of warnings and a waiver are required.[88] The right to silence and to have a lawyer present are personal rights. A lawyer's instruction to the police does not bind the police or the suspect.[89] Of course, such an instruction is a significant factor in determining whether a waiver of rights was knowledgeable, intelligent and voluntary.[90]

Miranda, of course, applies to *juveniles*, whether tried as adults or not.[91] While the circumstances of a juvenile's confession must be examined with greater scrutiny than that of an adult,[92] there is no requirement that a youth's parents be present during interrogations or that they be advised of the suspect's rights.[93] However, there is an obligation to notify the parents promptly of an arrest and the failure of the police to afford parents an opportunity to talk to the defendant may be proof that the waiver of rights was not freely, intelligently, and knowingly made.[94] Similarly, a specific request by a juvenile suspect to see his parents may indicate his desire to remain silent until they arrive and thus further questioning may be forbidden.[95] Of course, the presence of parents or other adult counsel is strong evidence of a valid waiver.[96]

IV. Waiver of Miranda Rights

A. *Nature of the Waiver*

In order to satisfy *Miranda*, the prosecution must show that

88. *See* Commonwealth v. Goldsmith, 438 Pa. 83, 263 A.2d 322 (1970); Commonwealth v. Leaming, 432 Pa. 326, 247 A.2d 590 (1968). *See also* Commonwealth v. Abrams, 443 Pa. 295, 278 A.2d 902 (1971) (warnings given-confession valid).

89. *See* United States v. Moriarty, 375 F.2d 901, 907 (7th Cir. 1967); Commonwealth v. Hawkins, 448 Pa. 206, 292 A.2d 302 (1972); Commonwealth v. Batley, 436 Pa. 377, 260 A.2d 793 (1970).

90. *See* Commonwealth v. Hawkins, 448 Pa. 206, 292 A.2d 302 (1972); Commonwealth v. Batley, 436 Pa. 377, 260 A.2d 793 (1970). *See also* Commonwealth v. DuVal, 453 Pa. 205, 307 A.2d 229 (1973).

91. *See In re* Geiger, 454 Pa. 51, 309 A.2d 599 (1973); *In re* Betrand, 451 Pa. 381, 303 A.2d 486 (1973).

92. Commonwealth v. Cobbs, 452 Pa. 397, 305 A.2d 25 (1973).

93. Commonwealth v. Fogan, 449 Pa. 552, 296 A.2d 755 (1972); Commonwealth v. Porter, 449 Pa. 153, 295 A.2d 311 (1972); Commonwealth v. Moses, 446 Pa. 350, 287 A.2d 131 (1971); Commonwealth v. Darden, 441 Pa. 41, 271 A.2d 257 (1970).

94. *See* Pa. Stat. Ann. tit. 11, §§ 55-101 to -337 (Supp. 1973). *See also* Haynes v. Washington, 373 U.S. 503 (1963); Commonwealth v. Harmon, 440 Pa. 195, 269 A.2d 744 (1970).

95. Haynes v. Washington, 373 U.S. 503 (1963).

96. Commonwealth v. Butcher, 451 Pa. 359, 304 A.2d 150 (1973); Commonwealth v. Frisby, 451 Pa. 16, 301 A.2d 610 (1973); Commonwealth v. Porter, 449 Pa. 153, 295 A.2d 311 (1972); Commonwealth v. Moses, 446 Pa. 350, 287 A.2d 131 (1971).

the suspect made a *knowing, intelligent* and *voluntary* waiver of his fifth amendment rights.[97] Whether such a waiver occurred is a question of fact to be determined by the trial judge.[98]

Miranda itself states that a waiver may be validly shown by an express statement that the individual is willing to make a statement without an attorney.[99] However, the mere giving of the warnings without an acknowledgement of knowledge and understanding by the suspect may not be sufficient to show a waiver.[100] The waiver need not be in writing,[101] and an agreement to give only an oral statement or a refusal to sign a written waiver or formal statement does not affect the validity of an earlier waiver or oral statement.[102] Of course, the signing of a written waiver by a literate suspect is a good indication of an acceptable waiver.[103]

A waiver may not be inferred from silence.[104] However, a clear, unequivocal acknowledgement of understanding and willingness to speak is sufficient, whether non-verbal or verbal.[105]

If a suspect indicates he wishes to remain silent or to speak to a lawyer, all questioning must stop.[106] However, a suspect may be told of changed circumstances, such as the death of a victim, and asked again if he wishes to waive his rights.[107] Similarly, a suspect may voluntarily and spontaneously give a statement after invoking the privilege. So long as the statement is not the result

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97. Miranda v. Arizona, 384 U.S. 436, 444-45 (1966); United States v. Stuckey, 441 F.2d 1104 (3d Cir. 1971); Commonwealth v. Dixon, 432 Pa. 423, 248 A.2d 231 (1968).

98. Commonwealth v. Matthews, 446 Pa. 65, 285 A.2d 510 (1971); Commonwealth v. Camm, 443 Pa. 253, 277 A.2d 325 (1971); Commonwealth v. Darden, 441 Pa. 41, 271 A.2d 257 (1970); Commonwealth v. Harmon, 440 Pa. 195, 269 A.2d 744 (1970); Commonwealth v. Rhoads, 225 Pa. Super. 208, 310 A.2d 406 (1973).

99. 384 U.S. 436, 475 (1966). *See* Commonwealth v. Smith, 424 Pa. 9, 11, 225 A.2d 691 (1967).

100. Commonwealth v. Goldsmith, 438 Pa. 83, 263 A.2d 322 (1970).

101. United States v. Stuckey, 441 F.2d 1104 (3d Cir. 1971); *see, e.g.*, Commonwealth v. Canales, 454 Pa. 422, 311 A.2d 572 (1973); Commonwealth v. Marabel, 445 Pa. 435, 283 A.2d 285 (1971).

102. United States v. Devall, 462 F.2d 137 (5th Cir. 1972); Pettyjohn v. United States, 419 F.2d 651 (D.C. Cir. 1969); United States v. Thompson, 417 F.2d 196 (4th Cir. 1969); Hodge v. United States, 392 F.2d 552 (5th Cir. 1968); Commonwealth v. Canales, Pa. , A.2d (1973); Commonwealth v. Porter, 449 Pa. 153, 295 A.2d 311 (1972).

103. Brooks v. United States, 416 F.2d 1044 (5th Cir. 1969); United States v. Goldsmith, 274 F. Supp. 494 (E.D. Pa. 1967).

104. Miranda v. Arizona, 384 U.S. 436, 475 (1966). *See* Commonwealth v. Goldsmith, 438 Pa. 83, 263 A.2d 322 (1970).

105. United States v. Boykin, 398 F.2d 483 (3d Cir. 1968); State v. Flores, 9 Ariz. App. 502, 454 P.2d 172 (1969) (Nod); Mullaney v. State, 5 Md. App. 248, 246 A.2d 291 (1968) (Nod).

106. Miranda v. Arizona, 384 U.S. 436, 473-74 (1966); Commonwealth v. Youngblood, 453 Pa. 225, 307 A.2d 922 (1973). *See* Virgin Islands v. Aguino, 378 F.2d 540 (3d Cir. 1967); Commonwealth v. Jefferson, 445 Pa. 1, 281 A.2d 852 (1971).

107. Commonwealth v. Grandison, 449 Pa. 231, 296 A.2d 730 (1972); Commonwealth v. Jefferson, 445 Pa. 1, 281 A.2d 852 (1971).

of police questioning, it is volunteered and thus admissible.[108] But this statement must be truly volunteered and the Commonwealth has a heavy burden to show that the subsequent waiver was not the result of inducements or tricks.[109]

What constitutes invocation of the privilege and thus the end to permissible questioning depends on the nature of the response to the warnings. When a defendant asks for counsel, questioning must stop. However, if the defendant merely calls his lawyer, an otherwise valid waiver is not affected.[110] Even if the defendant, after being told of his right to have an attorney present, mentions the name of his lawyer, that alone does not invoke the privilege. Subsequent actions, such as telling the police "not to bother," combined with an otherwise valid waiver, may allow questioning.[111]

B. *Intelligence, Knowledgeability and Voluntariness of Waiver*

The standards to determine whether a waiver was freely, intelligently and voluntarily given are similar to the pre-*Miranda* standards used to determine if a confession was voluntary. Age, intelligence, mental and physical condition, and police tactics are the chief factors.[112] Determination as to whether a waiver is valid is ordinarily a question of fact for the hearing judge.[113]

Age and Intelligence.—While the circumstances of a juvenile's confession must be examined with special scrutiny,[114] merely because a suspect is a juvenile does not mean that he cannot waive his rights.[115] If a juvenile is accompanied by a parent or given other

108. Commonwealth v. Franklin, 438 Pa. 411, 265 A.2d 361 (1970). *See* notes 45-61 and accompanying text *supra.*

109. United States v. Hill, 340 F. Supp. 344 (E.D. Pa. 1972). *Compare* Commonwealth v. Nathan, 445 Pa. 470, 285 A.2d 175 (1971), *with* Commonwealth v. Miller, 448 Pa. 114, 290 A.2d 62 (1972). *Compare* Commonwealth v. DuVal, 453 Pa. 205, 307 A.2d 229 (1973), *with* Commonwealth v. Youngblood, 453 Pa. 225, 307 A.2d 922 (1973).

110. Commonwealth v. Abrams, 443 Pa. 295, 278 A.2d 902 (1971). *See* State v. Graham, 59 N.J. 366, 283 A.2d 321 (1971).

111. Commonwealth v. McIntyre, 451 Pa. 42, 301 A.2d 832 (1973); Commonwealth v. Miller, 448 Pa. 114, 290 A.2d 62 (1972).

112. Commonwealth v. Taper, 434 Pa. 71, 253 A.2d 90 (1969).

113. Commonwealth v. Rhoads, 225 Pa. Super. 208, 310 A.2d 406 (1973). *Compare* Commonwealth v. Harmon, 440 Pa. 195, 269 A.2d 744 (1970), *with* Commonwealth v. Darden, 441 Pa. 41, 271 A.2d 257 (1970), *and* Commonwealth v. Moses, 446 Pa. 350, 287 A.2d 131 (1971), *and* Commonwealth v. Moore, 453 Pa. 302, 309 A.2d 569 (1973).

114. Commonwealth v. Cobbs, 452 Pa. 397, 305 A.2d 25 (1973).

115. United States *ex rel.* Brown v. Rundle, 450 F.2d 517 (3d Cir. 1971); Commonwealth v. Frisby, 451 Pa. 16, 301 A.2d 610 (1973) (14 year

independent adult guidance, it is strong evidence of a valid waiver.[116] Intelligence, including educational background, are key factors in determining whether a juvenile's waiver is knowing and intelligent. Psychiatric or lay testimony or records may be used to evaluate the ability to intelligently and understandingly waive rights. The credibility of these witnesses and evidence is for the trial judge, who may accept or reject all, some, or none.[117]

Mental and Physical Capacity.—Insanity or incompetency precludes a knowing and intelligent waiver. The test is "testimonial capacity"—understanding of the proceedings and ability to give a correct account.[118] Even with such capacity, the psychiatric, physiological or psychological condition of the defendant may still affect his ability to waive his *Miranda* rights. The test is whether the effect of the condition is such as to deprive a defendant of his rational intellect and free will thus precluding a knowledgeable, intelligent and voluntary waiver.[119] The condition may be caused by drugs, alcohol, physical injury or psychiatric imbalance. If responses are alert and intelligent, a waiver could be valid.[120] If the will of the defendant is overborne by his condition, the waiver is not a free and voluntary act.[121] Coherence, competency and responsiveness are subject to proof by testimony and exhibits. Credibil-

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old); Commonwealth v. Moses, 446 Pa. 350, 287 A.2d 131 (1971); Commonwealth v. Abrams, 443 Pa. 295, 278 A.2d 902 (1971); Commonwealth v. Darden, 441 Pa. 41, 271 A.2d 257 (1970); Commonwealth v. Murphy, 219 Pa. Super. 459, 281 A.2d 685 (1971). *See* Commonwealth v. Moore, 400 Pa. 86, 270 A.2d 200 (1970) (pre-*Miranda*—13 year old psychopath); Commonwealth v. Willman, 434 Pa. 489, 255 A.2d 534 (1969) (pre-*Miranda*—mental defective—60 I.Q.); Commonwealth *ex rel.* Joyner v. Brierley, 429 Pa. 156, 239 A.2d 434 (1968) (pre-*Miranda*—18 year old—80 I.Q.).

116. Commonwealth v. Butcher, 451 Pa. 359, 304 A.2d 150 (1973); Commonwealth v. Frisby, 451 Pa. 16, 301 A.2d 610 (1973). *See* notes 91-96 and accompanying text *supra.*

117. Commonwealth v. Scoggins, 451 Pa. 472, 304 A.2d 102 (1973) (3rd grade education); Commonwealth v. Daniels, 451 Pa. 163, 301 A.2d 841 (1973) (73 I.Q.); Commonwealth v. Abrams, 443 Pa. 295, 278 A.2d 902 (1971) (illiterate and 69 I.Q.); Commonwealth v. Williams, 443 Pa. 85, 277 A.2d 781 (1971) (8th grade education and 17 years old); Commonwealth v. Camm, 443 Pa. 253, 277 A.2d 325 (1971) ("brainwashed"—confession valid); Commonwealth v. Darden, 441 Pa. 41, 271 A.2d 257 (1970) (confession valid—16 year old, 71 I.Q.); Commonwealth v. Murphy, 219 Pa. Super. 459, 281 A.2d 685 (1971) (18 year old).

118. Commonwealth v. Mozillo, 443 Pa. 171, 278 A.2d 874 (1971).

119. United States *ex rel.* Cronan v. Mancusi, 444 F.2d 51 (2d Cir. 1971); Commonwealth v. Cannon, 453 Pa. 389, 309 A.2d 384 (1973); Commonwealth v. Davenport, 449 Pa. 263, 295 A.2d 596 (1972); Commonwealth v. Holton, 432 Pa. 11, 247 A.2d 228 (1968).

120. *See* Commonwealth v. Moore, 453 Pa. 302, 309 A.2d 569 (1973); Commonwealth v. Cannon, 453 Pa. 389, 309 A.2d 384 (1973); Commonwealth v. Swint, 450 Pa. 54, 296 A.2d 777 (1972); Commonwealth v. Hill, 444 Pa. 323, 281 A.2d 859 (1971); Commonwealth v. Rhoads, 225 Pa. Super. 208, 310 A.2d 406 (1973).

121. Commonwealth v. Davenport, 449 Pa. 263, 295 A.2d 596 (1972); Commonwealth v. Jackamowicz, 443 Pa. 313, 279 A.2d 7 (1971).

ity and degree of disfunction are questions for the judge to resolve.[122]

Coercion.—A waiver cannot be freely, intelligently and voluntarily entered if the method to secure it was coercive.[123] Of course, any physical violence imposed on the defendant to secure a waiver or statement renders that statement inadmissible.[124] But to make out a claim of physical abuse, evidence of beatings must relate to the instant interrogation. Past experience of a suspect or his associates does not render a waiver or confession invalid.[125] And whether or not there was a physical beating, indicating coercion, is a question of fact and credibility to be decided by the supression judge.[126]

Threats or coercive promises renders a statement invalid. Any trickery or cajolery is prohibited.[127] While explicit or implicit promises of leniency ordinarily make a waiver and subsequent statement invalid,[128] an accurate statement, such as that the police officer would advise the prosecutor and the court of cooperation,[129] does *not* render the waiver or confession involuntary or inadmissible. Confrontation of a defendant with evidence or co-defendants[130] or with a polygraph examination[131] does not taint an otherwise admissible waiver or confession. Of course, such confronta-

122. United States *ex rel.* Cronan v. Mancusi, 444 F.2d 51 (2d Cir. 1971); United States v. Welsh, 417 F.2d 361 (5th Cir. 1969); Commonwealth v. Cannon, 453 Pa. 389, 309 A.2d 384 (1973); Commonwealth v. Miller, 448 Pa. 114, 290 A.2d 62 (1972); Commonwealth v. Holton, 432 Pa. 11, 247 A.2d 228 (1968).

123. Commonwealth v. Jackamowicz, 443 Pa. 313, 279 A.2d 7 (1971); Commonwealth v. Abrams, 443 Pa. 295, 278 A.2d 902 (1971). For cases on the analogous pre-*Miranda* issue, *see* Columbe v. Connecticut, 367 U.S. 568, 601 (1961); Commonwealth v. Senk, 412 Pa. 184, 194 A.2d 221 (1963).

124. Commonwealth v. Hollowell, 444 Pa. 221, 282 A.2d 327 (1971).

125. Commonwealth v. Moore, 443 Pa. 364, 279 A.2d 179 (1971).

126. Commonwealth v. McIntyre, 451 Pa. 42, 301 A.2d 832 (1973); Commonwealth v. Eiland, 450 Pa. 566, 301 A.2d 651 (1973).

127. Thus, a threat to lock up a defendant's wife, to beat him up if he does not make a statement, or a promise to secure medical treatment for an injured or suffering suspect only if he waives and confesses renders the confession inadmissible. *See, e.g.*, United States *ex rel.* Collins v. Maroney, 287 F. Supp. 420 (E.D .Pa. 1968).

128. Commonwealth v. Nathan, 445 Pa. 470, 285 A.2d 175 (1971).

129. United States v. Glasgow, 451 F.2d 557 (9th Cir. 1971); State v. Geldart, 111 N.H. 219, 279 A.2d 588 (1971).

130. *See, e.g.*, Commonwealth v. McKinney, 453 Pa. 10, 306 A.2d 305 (1973); Commonwealth v. Marabel, 445 Pa. 435, 283 A.2d 285 (1971); Commonwealth v. Moore, 443 Pa. 364, 279 A.2d 179 (1971).

131. Tyler v. Peyton, 294 F. Supp. 1351, 1352 (E.D. Va. 1968); Commonwealth v. Camm, 443 Pa. 253, 277 A.2d 325 (1971); Commonwealth v. Hipple, 333 Pa. 33, 3 A.2d 353 (1939); State v. Ridgely, 251 S.C. 556, 164 S.E.2d 439 (1968).

tions or polygraph examinations are proper only if a defendant is duly warned and then waives his rights. They are not substitutes for warnings to secure "volunteered" statements.[132]

"Subtle inducements" do not necessarily invalidate confessions. Thus, describing the procedure by which a confession is to be recorded,[133] telling a defendant what the police believe to be his involvement,[134] or agreeing to carry out a defendant's request[135] are not considered prohibited trickery. Such "subtle inducements," however, may not be used to convince a suspect to change his mind and waive his rights after he has already exercised his privilege.[136] Nor may they be used in lieu of or as part of warnings to secure a waiver, but rather they may only be used after warnings and a knowing and intelligent waiver.[137] Of course, a purely subjective impression by a defendant, without any objective indication of police action, is not an inducement.[138]

C. *Duration of Questioning and Waiver*

Time of Warnings.—There is no requirement that a suspect be warned immediately upon his arrest. As long as warnings are given and a waiver received before the interrogation itself the procedure is proper.[139] Of course, an overlong delay prior to warnings may be a factor of a "softening up process" indicating that the waiver is not knowing, intelligent and voluntary. This factor is to be considered, with all others, to determine the validity of a waiver.[140]

Duration of Waiver.—There is *no* requirement that once a defendant is warned and waives *Miranda* rights, he must be rewarned and rewaive before each and every time he is questioned nor that the officer who warned him be the same one to question him and hear his confession.[141] The factors to be evaluated in de-

132. *See* Commonwealth v. Mercier, 451 Pa. 211, 302 A.2d 337 (1973); Commonwealth v. Hamilton, 445 Pa. 292, 285 A.2d 172 (1971) (no warnings); Commonwealth v. Franklin, 438 Pa. 411, 265 A.2d 361 (1970) (warnings); Commonwealth v. Leaming, 432 Pa. 326, 247 A.2d 590 (1968) (no warnings).

133. State v. Graham, 59 N.J. 366, 283 A.2d 321 (1971).

134. Commonwealth v. Mitchell, 445 Pa. 461, 285 A.2d 93 (1971).

135. *See* Brown v. Brierley, 438 F.2d 954 (3d Cir. 1971); Commonwealth v. Brown, 437 Pa. 1, 261 A.2d 879 (1970).

136. Commonwealth v. Nathan, 445 Pa. 470, 285 A.2d 175 (1971).

137. Commonwealth v. Singleton, 439 Pa. 185, 266 A.2d 753 (1970).

138. Commonwealth v. LaCourt, 448 Pa. 86, 292 A.2d 377 (1972).

139. Commonwealth v. Parks, 453 Pa. 296, 309 A.2d 725 (1973).

140. Virgin Islands v. Malone, 457 F.2d 548 (3d Cir. 1972); Commonwealth v. Bartlett, 446 Pa. 392, 288 A.2d 796 (1972); Commonwealth v. Murphy, 219 Pa. Super. 459, 281 A.2d 685 (1971).

141. Commonwealth v. Clark, 453 Pa. 449, 309 A.2d 589 (1973); Commonwealth v. Parks, 453 Pa. 296, 309 A.2d 725 (1973); Commonwealth v. Dennis, 451 Pa. 340, 304 A.2d 111 (1973); Commonwealth v. Bradley, 449 Pa. 19, 295 A.2d 842 (1972); Commonwealth v. Abrams, 443 Pa. 295, 278 A.2d 902 (1971).

termining whether a waiver has become stale or remote by the time of a statement are:

1) length of time since warnings and waiver were given;

2) whether the statement was given in the same place as the warnings and waiver;

3) whether the same officer gave the warnings and took the statements;

4) whether the information elicited during the interrogation was significantly different than other prior statements.[142]

Length of Interrogation.—Continuous questioning of a suspect can indicate an overborne will and an ineffective waiver.[143] To render the interrogation involuntary, the questioning must be continuous and long periods of custody have been upheld where the questioning is intermittent.[144] Ability to use lavatory facilities, eat, rest and relax are all considered in determining whether the length of questioning is coercive.[145] Fatigue, alone, may but need not necessarily make a waiver involuntary.[146]

Recent decisions of the Pennsylvania Supreme Court [147] have

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142. Commonwealth v. Clark, 449 Pa. 453, 309 A.2d 589 (1973); Commonwealth v. Parks, 453 Pa. 256, 309 A.2d 725 (1973); Commonwealth v. Riggins, 451 Pa. 519, 304 A.2d 473 (1973); Commonwealth v. Bradley, 449 Pa. 19, 295 A.2d 842 (1972); Commonwealth v. Hoss, 445 Pa. 98, 283 A.2d 58 (1971); Commonwealth v. Bennett, 445 Pa. 8, 282 A.2d 276 (1971); Commonwealth v. Ferguson, 444 Pa. 478, 282 A.2d 378 (1971).

143. Commonwealth v. Riggins, 451 Pa. 519, 304 A.2d 473 (1973); Commonwealth v. Eiland, 450 Pa. 566, 301 A.2d 651 (1973).

144. *See* Commonwealth *ex rel.* Craig v. Maroney, 348 F.2d 22, 17 (3d Cir. 1965), *cert. denied*, 384 U.S. 1019 (1966) (48 hours of questioning; confession five days after arrest); United States *ex rel.* Peterson v. LaVallee, 279 F.2d 396, 399 (2d Cir. 1960) (intermittent questioning of 69 hours), *cert. denied*, 364 U.S. 922 (1961); Thompson v. Pepersack, 270 F. Supp. 793, 796-98 (D. Md. 1967), *aff'd*, 413 F.2d 454 (4th Cir. 1969) (12 hours); Commonwealth v. Biebighauser, 450 Pa. 336, 300 A.2d 70 (1973); Commonwealth v. Darden, 441 Pa. 41, 271 A.2d 257 (1970); Commonwealth v. Willman, 434 Pa. 489, 255 A.2d 534 (1969); Commonwealth *ex rel.* Brown v. Myers, 433 Pa. 25, 249 A.2d 337 (1969); Commonwealth v. Hornberger, 430 Pa. 413, 415, 243 A.2d 341, 342 (1968) (20 hours before confession); Commonwealth *ex rel.* Joyner v. Brierley, 429 Pa. 156, 239 A.2d 434 (1968) (10 hours); Commonwealth v. Schmidt, 423 Pa. 432, 224 A.2d 625 (1966); Commonwealth v. Cheeks, 423 Pa. 67, 223 A.2d 291 (1966); Commonwealth v. Graham, 408 Pa. 155, 182 A.2d 727 (1962).

145. *See* Commonwealth v. McIntyre, 451 Pa. 42, 301 A.2d 832 (1973); Commonwealth v. Moore, 443 Pa. 364, 279 A.2d 179 (1971); Commonwealth v. Abrams, 443 Pa. 295, 278 A.2d 902 (1971); Commonwealth v. Moore, 440 Pa. 86, 270 A.2d 200 (1970); Commonwealth v. Murphy, 219 Pa. Super. 459, 281 A.2d 685 (1971).

146. Commonwealth v. Koch, 446 Pa. 469, 288 A.2d 791 (1972).

147. Commonwealth v. Futch, 447 Pa. 389, 290 A.2d 417 (1972); Com-

held that the state criminal procedure rules[148] require the suppression of evidence resulting from "unnecessary delay in a preliminary arraignment." This doctrine applies to any confession obtained after January 1, 1965.[149] As to confessions taken before the applicability date or in cases where no specific challenge was made as to delay, the earlier standard of continuous versus intermittent questioning applies.[150]

V. Miranda and Other Rules

A. *Miranda and Massiah*

In a pre-*Miranda* decision, *Massiah v. United States*,[151] the United States Supreme Court prohibited questioning and the securing of a statement *without the presence of counsel* after the defendant has entered the formal criminal process and after he had secured, requested or been assigned counsel.[152] However, as the right to remain silent and to have counsel present is a personal right of the suspect, he may, of course, waive it.[153] The waiver must be specific as to his right to counsel,[154] and must be knowing, intelligent and voluntary,[155] Upon request for counsel all questioning must stop.[156]

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monwealth v. Tingle, 451 Pa. 241, 301 A.2d 701 (1973). *See* discussion in notes 158-169 and accompanying text *infra*.

148. Pa. R. Crim. P. 118.

149. *Futch* and *Tingle* applied rule 118, effective May 1, 1970. In Commonwealth v. Peters, 453 Pa. 615, 306 A.2d 901 (1973), the court stated that the principles in those cases merely applied the already existing law and held that the doctrine was to be retroactively applied to any confession after the effective date of the Rule. In Commonwealth v. Dutton, 453 Pa. 547, 307 A.2d 238 (1973), the court applied the same doctrine, under the authority of former Pa. R. Crim. P. 116(a) (superseded by Rule 118), to all confessions after the effective date of that rule—January 1, 1965. *See In re* Geiger, 454 Pa. 51, 58 n.9, 309 A.2d 559, 563 n.9 (1973) (applying the *Futch/Tingle* rule to juvenile proceedings).

150. Commonwealth v. Riggins, 451 Pa. 519, 304 A.2d 473 (1973); Commonwealth v. Eiland, 450 Pa. 566, 301 A.2d 651 (1973); Commonwealth v. Biebighauser, 450 Pa. 336, 300 A.2d 70 (1973).

151. Massiah v. United States, 377 U.S. 201 (1967).

152. Massiah v. United States, 377 U.S. 201 (1964); United States *ex rel.* Daley v. Yeager, 415 F.2d 779 (3d Cir. 1969); United States *ex rel.* O'Conner v. New Jersey, 405 F.2d 632 (3d Cir. 1969).

153. Miranda v. Arizona, 384 U.S. 436, 474 (1966); United States v. Crisp, 435 F.2d 354, 358 (7th Cir. 1969); Davis v. Burke, 408 F.2d 779 (7th Cir. 1969); United States *ex rel.* O'Connor v. New Jersey, 405 F.2d 632 (3d Cir. 1969); Dillon v. United States, 391 F.2d 433 (10th Cir. 1968); United States v. Braverman, 376 F.2d 249 (2d Cir. 1967), *cert. denied*, 389 U.S. 885 (1967); Commonwealth v. Hoss, 445 Pa. 98, 110, 283 A.2d 58, 65 (1971).

154. Commonwealth *ex rel.* Craig v. Maroney, 348 F.2d 22 (3d Cir. 1965); Commonwealth v. Dickerson, 428 Pa. 564, 237 A.2d 229 (1968).

155. United States *ex rel.* O'Connor v. New Jersey, 405 F.2d 632, 636 (3d Cir. 1969); Commonwealth v. Hoss, 445 Pa. 98, 110, 283 A.2d 58, 65 (1971). *See* United States *ex rel.* Dickerson v. Rundle, 430 F.2d 462, 465 (3d Cir. 1970).

156. *Compare* United States *ex rel.* Daley v. Yeager, 415 F.2d 779 (3d Cir. 1969), *with* United States *ex rel.* Brown v. Rundle, 450 F.2d 517 (3d

This *Massiah* rule has been somewhat limited by *Miranda.* If a suspect is fully warned of his *Miranda* rights and waives them, he has elected to speak without counsel, thus in effect waiving his *Massiah* rights as well.[157]

B. *Miranda and McNabb-Mallory*

In a series of cases, *McNabb v. United States*[158] and *Mallory v. United States,*[159] the United States Supreme Court interpreted the Federal Rules of Criminal Procedure (Rule 5) to preclude the admission of confessions taken from a defendant during a period of "unnecessary delay" prior to arraignment.[160]

A similar provision has existed in Pennsylvania since January 1, 1965.[161] Until 1972, there was no *per se* rule mandating the suppression of a statement because of a violation of this provision.[162] Length of interrogation was only one factor, among many, to be considered in determining whether a confession was voluntary and a waiver knowing, intelligent and voluntary.[163]

On April 20, 1972, the Pennsulvania Supreme Court held that its Rules preclude the use of any testimony obtained as the result of "unnecessary delay" in a preliminary arraignment.[164] Later decisions made this doctrine applicable to all proceedings, adult or juvenile,[165] and all confessions taken after January 1, 1965.[166]

What makes a delay "unnecessary" is a question of fact. The standard of admissibility is that the delay *did not contribute to the*

Cir. 1971) *and* Commonwealth *ex rel.* Brown v. Myers, 433 Pa. 25, 249 A.2d 337 (1969).

157. United States v. Cobbs, 481 F.2d 196 (3d Cir. 1973); United States v. Crisp, 435 F.2d 354 (7th Cir.), *cert. denied,* 402 U.S. 947 (1971); State v. Melton, 307 Kan. 700, 486 P.2d 1361 (1971); Commonwealth v. Frongillo, 359 Mass. 132, 137, 268 N.E.2d 341, 344 (1971); Commonwealth v. Hoss, 445 Pa. 98, 110-11, 283 A.2d 58 (1971).

158. McNabb v. United States, 318 U.S. 333 (1943).

159. Mallory v. United States, 354 U.S. 449 (1957).

160. *See* Mallory v. United States, 354 U.S. 449, 454 (1957): "The purpose of Federal Rule 5 is to allow the Magistrate to tell defendant of his rights to silence and counsel."

161. PA. R. CRIM. P. 116(a) was superseded by PA. RULE CRIM. P. 118. *See* notes 147-150 and accompanying text *supra.*

162. Commonwealth v. Koch, 446 Pa. 469, 288 A.2d 791 (1972); Commonwealth v. Moore, 444 Pa. 24, 279 A.2d 146 (1971).

163. *See* notes 143-146 and accompanying text *supra.*

164. Commonwealth v. Futch, 447 Pa. 389, 290 A.2d 417 (1972).

165. *In re* Geiger, 454 Pa. 51, 309 A.2d 559 (1973).

166. Commonwealth v. Peters, 453 Pa. 615, 306 A.2d 901 (1973); Commonwealth v. Dutton, 453 Pa. 615, 307 A.2d 238 (1973). *See* note 149 and accompanying text *supra.*

securing of the evidence—that is, that the evidence had "no reasonable relationship to the delay." Delay up to the securing of the inculpatory evidence would be the ordinary measure. Delay after securing inculpatory evidence would ordinarily not be relevant as it did not lead to the evidence.[167]

Delay utilized to verify a story so as to exculpate a defendant is justified. Delay to handle normal and necessary administrative procedures such as booking, fingerprinting, bail review, and a records check, would also be justified. Delay solely to secure an inculpatory statement, after repeated denials or an invocation of the privilege against self-incrimination, would not be justified. Delay to make arrangements for a lineup, easily scheduled after arraignment, would not be justified.[168]

For cases involving a pre-1965 confession or where the "delay in arraignment rule" is not raised, the question then reverts back to whether defendant was warned of his rights and whether his waiver, considering the length of interrogation and all other factors, was knowing, intelligent and voluntary.[169]

VI. Miranda and Taint

A confession that follows an illegal arrest, illegal search, or invalid confession can only be used as evidence if it is established that the statement *was not obtained* by "exploitation of the original illegality" but *was obtained* under circumstances sufficiently distinguishable to purge it of any original taint.[170] The burden is on the state[171] to prove that the confession resulted from such an act of free will by the suspect or by means so attenuated from the original illegality that it is not the fruit of the poisonous tree.[172] For example, if the prosecution can show that the evidence would have been discovered by means completely independent of the tainted prior action, the statement is admissible.[173]

Arrest.—Even assuming an illegal arrest, a confession secured thereafter is not automatically excluded.[174] While a free, intelli-

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167. Commonwealth v. Dixon, 454 Pa. 444, 311 A.2d 613 (1973); Commonwealth v. Tingle, 451 Pa. 241, 301 A.2d 701 (1973); Commonwealth v. Futch, 447 Pa. 389, 290 A.2d 417 (1972).

168. Commonwealth v. Futch, 447 Pa. 389, 290 A.2d 417 (1972); Commonwealth v. Tingle, 451 Pa. 241, 301 A.2d 701 (1973).

169. Commonwealth v. Riggins, 451 Pa. 519, 304 A.2d 473 (1973); Commonwealth v. Eiland, 450 Pa. 566, 301 A.2d 651 (1973); Commonwealth v. Moore, 444 Pa. 24, 279 A.2d 146 (1971).

170. Commonwealth v. Banks, 429 Pa. 53, 239 A.2d 416 (1968).

171. *In re* Betrand, 451 Pa. 381, 303 A.2d 486 (1973).

172. Wong Sun v. United States, 371 U.S. 471, 486 (1963); Commonwealth v. Rowe, 445 Pa. 454, 282 A.2d 319 (1971); Commonwealth v. Bishop, 425 Pa. 175, 181-83, 228 A.2d 661, 665-66 (1967), *cert. denied*, 389 U.S. 875 (1967).

173. Wong Sun v. United States, 371 U.S. 471 (1963).

174. *Id.*; Commonwealth v. Bishop, 425 Pa. 175, 181-83, 228 A.2d 661, 665-66 (1967), *cert. denied*, 384 U.S. 875 (1967).

gent and voluntary waiver of one's rights is, of course, necessary to uphold a confession, more is needed than a waiver to purge the taint of an illegal arrest.[175] A statement made *soon after* an illegal arrest *is* generally found to be tainted, absent other circumstances.[176] A statement made a *period of time after* an illegal arrest may be found *not* to be tainted.[177] A statement made after an intervening event, such as the confession of the co-defendant implicating a suspect, may be considered to be purged of the taint.[178]

Search and Seizure.—Similarly, a prior illegal search and seizure does not necessarily taint a subsequent statement.[179] The test is the causal connection between the illegal search and seizure and the statements. If the results of the illegal search are utilized to procure a confession, there is a clear taint.[180]

Prior Unwarned Statement.—Whether a properly secured statement derives from prior illegal questioning and is thus tainted depends on the totality of the circumstances.[181] Clearly, if prior questioning was as to an unrelated offense, there is no taint.[182] Similarly, where a defendant indicates he wishes to speak to "get it off his chest" or to "*purge his conscience*," the later statement may not be the result of exploitation of any prior illegality.[183] If the police confront a defendant with the statements of co-defendants or witnesses or properly secured evidence, the later properly warned statement would not be the result of prior illegality but

175. *In re* Betrand, 451 Pa. 381, 303 A.2d 486 (1973).
176. *Id.*
177. Commonwealth v. Mitchell, 445 Pa. 461, 285 A.2d 93 (1971); Commonwealth v. Marabel, 445 Pa. 435, 283 A.2d 285 (1971); Commonwealth v. Jacobs, 445 Pa. 364, 284 A.2d 717 (1971).
178. Commonwealth v. Fogan, 449 Pa. 552, 296 A.2d 755 (1973).
179. Wong Sun v. United States, 371 U.S. 471 (1963); Nardone v. United States, 308 U.S. 338 (1939).
180. Commonwealth v. Rowe, 445 Pa. 454, 282 A.2d 319 (1971). *See* United States v. Singleton, 439 F.2d 381 (3d Cir. 1971); Commonwealth v. Marabel, 445 Pa. 435, 283 A.2d 285 (1971) (no prior information utilized, confession valid); Commonwealth v. Frazier, 443 Pa. 178, 279 A.2d 33 (1971).
181. Commonwealth v. Marabel, 445 Pa. 435, 283 A.2d 285 (1971); Commonwealth v. Bordner, 432 Pa. 405, 247 A.2d 612 (1968); Commonwealth v. Moody, 429 Pa. 39, 44, 239 A.2d 409, 412 (1968), *cert. denied*, 393 U.S. 882 (1968).
182. United States v. Jackson, 448 F.2d 963 (9th Cir. 1971). *See* Commonwealth v. Grandison, 449 Pa. 231, 296 A.2d 730 (1972); Commonwealth v. Jefferson, 445 Pa. 1, 281 A.2d 852 (1971). Of course, the length and nature of the interrogation are factors to be considered in determining whether a waiver is knowing, intelligent, and voluntary.
183. Commonwealth v. Moody, 429 Pa. 39, 239 A.2d 409 (1968), *cert. denied*, 393 U.S. 882 (1968).

would come from the *separate source.*[184]

If the later properly warned interrogation is separated in time and place from the original questioning, there is a distinct *break in the stream of events* indicated that the later statement is purged of any taint.[185] This is especially true if *different police officers,* not knowing of prior unwarned questioning, are involved.[186] The use of information derived from a prior unwarned statement (or illegal evidence) may "weigh heavily on the suspect's mind" and thus taint a subsequent confession given after warnings.[187] But if the prior statements were exculpatory or non-damaging, later warned incriminatory statements may not be tainted.[188]

Of course, the most important element to determine the lack of taint is whether the *Miranda* warnings were given and understood at a time early enough to allow the suspect to take advantage of them. The wearing down of a suspect by continuous questioning and custody might indicate taint as well as the lack of a valid waiver. On the other hand, warnings and a waiver given at a stage early enough to allow a knowing waiver points to lack of taint.[189]

VII. Procedure

In accord with *Jackson v. Denno,*[190] a defendant is entitled to a separate proceeding to determine the admissibility of a statement. The procedure to be followed in Pennsylvania is detailed in Rule 323, Rules of Criminal Procedure.[191]

A. *The Hearing*

The suppression hearing may be either prior to or at the

184. Commonwealth v. Marabel, 445 Pa. 435, 283 A.2d 285 (1971).

185. Miranda v. Arizona, 384 U.S. 436, 496 (1966); Commonwealth v. Mitchell, 445 Pa. 461, 285 A.2d 93 (1971); Commonwealth v. Marabel, 445 Pa. 435, 283 A.2d 285 (1971); Commonwealth v. Frazier, 443 Pa. 178, 279 A.2d 33 (1971). *Cf.* Commonwealth v. Ware, 438 Pa. 519, 265 A.2d 790 (1970).

186. *See* Miranda v. Arizona, 384 U.S. 436, 496 (1966); Commonwealth v. Nathan, 445 Pa. 470, 285 A.2d 175 (1971); Commonwealth v. Mitchell, 445 Pa. 461, 285 A.2d 93 (1971); Commonwealth v. Jacobs, 445 Pa. 364, 284 A.2d 717 (1971).

187. Commonwealth v. Rowe, 445 Pa. 454, 282 A.2d 319 (1971).

188. Commonwealth v. Bartlett, 446 Pa. 392, 288 A.2d 796 (1972); Commonwealth v. Marabel, 445 Pa. 435, 283 A.2d 285 (1971); Commonwealth v. Mitchell, 445 Pa. 461, 285 A.2d 93 (1971); Commonwealth v. Frazier, 443 Pa. 178, 279 A.2d 33 (1971).

189. United States v. Shea, 436 F.2d 740 (9th Cir. 1970); State v. Wade, 116 N.J. Super. 449, 282 A.2d 763 (1971); Commonwealth v. Mitchell, 445 Pa. 461, 285 A.2d 293 (1971); Commonwealth v. Marabel, 445 Pa. 435, 283 A.2d 285 (1971).

190. Jackson v. Denno, 378 U.S. 368 (1969).

191. *See* Commonwealth v. Jones, 450 Pa. 372, 301 A.2d 631 (1973).

trial.[192] The state must sustain its heavy burden of showing that the defendant has knowingly, intelligently, and voluntarily waived his rights by first comming forth with evidence to prove admissibility and then by proving admissibility by a preponderance of the evidence.[193] If the state says it does not intend to introduce a confession, that decision is binding and the statement may not be used at trial.[194] Similarly, contentions that a statement was never made or is inaccurate cannot be raised by a defendant at a suppression hearing. They are questions of fact—going to the credibility of the witnesses presenting the evidence—and thus solely for the fact finder *at trial.*[195] Ordinarily, the testimony of one or more state witnesses is sufficient to show a valid waiver[196] and thereafter the defendant must show such waiver to be invalid.[197] Warnings may be read from a card, given orally, or written. The waiver may be indicated from the recollection of the police officer, his notes, or from signed notations by a defendant on a formal statement.[198]

At the suppression hearing, the judge may hear and evaluate all evidence. He may properly read, consider and evaluate the actual confession—not for its truthfulness but for its value as proof of warnings and a valid waiver.[199] He may consider a defendant's prior police or criminal contacts to evaluate the experience a defendant has had and thus the knowledgeability of his waiver.[200] Credibility and resolution of conflicting pieces of evidence are questions for the suppression judge.[201]

B. *The Trial*

The suppression judge may clearly sit as the trial judge

192. PA. R. CRIM. P. 323(b), (c). *See* Commonwealth v. Brown, 226 Pa. Super. 30, 312 A.2d 428 (1973).

193. Lego v. Towmey, 404 U.S. 477 (1972); Commonwealth v. Ravenell, 448 Pa. 162, 292 A.2d 365 (1972); Commonwealth *ex rel.* Butler v. Rundle, 429 Pa. 141, 239 A.2d 426 (1968).

194. Commonwealth v. Tull, 224 Pa. Super. 494, 307 A.2d 318 (1973).

195. Commonwealth v. Johnson, 452 Pa. 130, 305 A.2d 5 (1973).

196. United States v. McQueen, 458 F.2d 1049 (3d Cir. 1972). *See* Commonwealth v. Ezell, 440 Pa. 92, 269 A.2d 462 (1970).

197. Commonwealth v. Abrams, 443 Pa. 295, 278 A.2d 902 (1971).

198. *See* Moll v. United States, 413 F.2d 1233 (5th Cir. 1969); United States v. Goldsmith, 274 F. Supp. 494 (E.D. Pa. 1967).

199. *See* Commonwealth v. Moore, 443 Pa. 364, 279 A.2d 179 (1971).

200. Jordon v. United States, 421 F.2d 493 (9th Cir. 1970); People v. Pierce, 260 Cal. App. 2d 652, 67 Cal. Rptr. 438 (1968); State v. Miller, 35 Wis. 2d 454, 151 N.W.2d 157 (1967).

201. *See, e.g.*, Commonwealth v. Joseph, 451 Pa. 440, 304 A.2d 163 (1973).

in a jury trial. If the trial is before a judge alone, the suppression judge may also sit as the trial judge, unless prejudice is shown.[202] The decision of the suppression judge is final and binding at trial.[203] However, while the Constitution does not require it,[204] the defendant may, under Pennsylvania Rules, raise the question of voluntariness at trial.[205] Of course, failure to raise that issue, like any other issue at trial, could result in the proper removal of the issue from the fact finder's consideration.[206] Voluntariness need only be shown by a preponderance of the evidence.[207]

If the State said it would not introduce the confession at trial, that decision is binding and the confession must be treated as suppressed and thus inadmissible.[208] Recently, in *Harris v. New York*,[209] the United States Supreme Court has decided that confessions inadmissible under *Miranda* may be used to impeach a defendant who has testified. While most courts have followed this holding and have allowed the use of such statements for impeachment purposes,[210] Pennsylvania courts have not yet overruled their previous decisions[211] precluding the use of such statements for any purpose.[212] Of course, even under *Harris*, an involuntary, as distinguished from a contra-*Miranda* confession may still not be used at all.[213]

C. *Appellate Review*

The lower court's evaluation of the evidence of coercion, physical or mental abiility, warnings and a waiver are binding and his findings of fact are not subject to review, so long as they are supported by the record.[214] However, his conclusions

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202. Commonwealth v. Paquette, 451 Pa. 250, 301 A.2d 837 (1973); Commonwealth v. Corbin, 447 Pa. 463, 291 A.2d 307 (1972).

203. PA. R. CRIM. P. 323(j); Commonwealth *ex rel.* Butler v. Rundle, 429 Pa. 141, 239 A.2d 426 (1969).

204. Lego v. Twomey, 404 U.S. 477 (1972).

205. PA. R. CRIM. P. 323(j); Commonwealth *ex rel.* Butler v. Rundle, 429 Pa. 141, 239 A.2d 426 (1969).

206. Commonwealth v. Cannon, 453 Pa. 389, 309 A.2d 384 (1973).

207. Commonwealth v. McIntyre, 451 Pa. 42, 301 A.2d 832 (1973).

208. Commonwealth v. Tull, 224 Pa. Super. 494, 307 A.2d 318 (1973).

209. Harris v. New York, 401 U.S. 222 (1971).

210. *See, e.g.*, United States v. McQueen, 458 F.2d 1049 (3d Cir. 1972).

211. Commonwealth v. Padgett, 428 Pa. 229, 237 A.2d 209 (1968).

212. *See* Commonwealth v. Tull, 224 Pa. Super. 494, 307 A.2d 318 (1973); Commonwealth v. Horner, 453 Pa. 435, 441, 309 A.2d 552, 555 (1973) (concurring opinion of J. Roberts).

213. United States v. McQueen, 458 F.2d 1049 (3d Cir. 1972).

214. Commonwealth v. Johnson, 452 Pa. 130, 305 A.2d 5 (1973); Commonwealth v. Ravenell, 448 Pa. 162, 292 A.2d 365 (1972); Commonwealth v. Moore, 444 Pa. 24, 279 A.2d 146 (1971); Commonwealth v. Camm, 443 Pa. 253, 277 A.2d 325 (1971); Commonwealth v. Frazier, 443 Pa. 178, 279 A.2d 33 (1971); Commonwealth v. Darden, 441 Pa. 41, 271 A.2d 257 (1970); Commonwealth v. Corbin, 440 Pa. 65, 269 A.2d 475 (1970); Commonwealth v. Murphy, 219 Pa. Super. 459, 281 A.2d 685 (1971).

of law, including determinations of ultimate facts, such as whether particular words or actions constitute a waiver, are subject to review.[215] The review is limited to a consideration of the testimony of the witnesses of the party successful below, and so much of the testimony of other witnesses as stands uncontradicted.[216]

PART II—SEARCHES AND SEIZURES

VIII. Introduction

The basis for the search and seizure exclusionary rule is found in the Fourth Amendment of the United States Constitution which provides:

> The right of the people to be secure in their persons, houses, paper and effects, against unreasonable searches shall not be violated and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be searched.[217]

On February 24, 1914, the Supreme Court held that, in *federal criminal cases*, violations of this Amendment would require the exclusion at trial of any evidence derived from such actions.[218] On June 19, 1961, this "*exclusionary rule*" was extended to criminal cases[219] in the state courts.[220]

IX. Warrant Requirement

The *general rule* is that, in order to search a person or prop-

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215. Commonwealth v. Youngblood, 453 Pa. 225, 307 A.2d 922 (1973).

216. Commonwealth v. Riggins, 451 Pa. 519, 304 A.2d 473 (1973); Commonwealth v. Davenport, 449 Pa. 263, 295 A.2d 596 (1972).

217. U.S. Const. amend. III. Similarly, Pa. Const. art. 1, § 8 provides:

> The people shall be secure in their persons, houses, papers, and possessions from unreasonable searches and seizures and no warrant to search any place or to seize any person or thing shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to by the affiant.

While recent opinions by the Justices of the United States Supreme Court have indicated dissatisfaction with the exclusionary rule (*see* Schneckloth v. Bustamonte, 412 U.S. 217 (1973); Coolidge v. New Hampshire, 403 U.S. 443 (1971); Bivens v. Six Unknown Agents, 403 U.S. 388 (1971)), several Pennsylvania Supreme Court Justices have indicated that the exclusionary rule can be applied in *this Commonwealth* under provisions such as article 1, § 8 of the Pennsylvania constitution.

218. Weeks v. United States, 232 U.S. 383 (1914).

219. Thus, it applies to adjudicatory hearings in juvenile court. *In re* Harvey, 222 Pa. Super. 222, 295 A.2d 93 (1972).

220. Mapp v. Ohio, 367 U.S. 643 (1961).

erty, a *search warrant* must be obtained.[221] There are, of course, exceptions, which will be discussed later.[222]

A. *Constitutional Requirements*

In accord with the United States (and Pennsylvania[223]) Constitution, a warrant:

1. must be issued by a *neutral and detached Magistrate on oath or affirmation*;
2. *must particularly describe the premises or* person to be searched;
3. must *specifically describe the property to be seized*; and,
4. must show *probable cause* to believe that evidence would be found.

(1) *Neutral and Detached Magistrate upon Oath Affirmation*

As a matter of federal constitutional law, a state may allow *any impartial agency* to act as an authorized magistrate to issue a warrant. A *District Attorney or Attorney General* is *not* considered to be so *impartial* as to be acceptable as a neutral and detached evaluator.[224] A lay municipal clerk, removed from the prosecutor and the police and subject to supervision by the Court, *is* constitutionally acceptable.[225] However, *under Pennsylvania Rules* of Criminal Procedure,[226] *only* a judicial officer termed *an issuing authority*,[227] with jurisdiction over the person or place to be searched, may approve a search warrant.

"Upon oath or affirmation" means that, constitutionally, *oral sworn testimony* before the Magistrate may be considered in addition to the warrant and affidavits attached to the warrant.[228]

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221. Almeida-Sanchez v. United States, 413 U.S. 266 (1973); Katz v. United States, 389 U.S. 347, 357 (1967).

222. These exceptions are (1) *search by consent, see* notes 322-45 and accompanying text *infra*; (2) *searches in emergencies see* notes 346-55 and accompanying text *infra*; (3) *searches and seizures* of items in *plain view, see* notes 356-68 and accompanying text *infra*; (4) *searches incident to arrest, see* notes 369-438 and accompanying text *infra*; (5) *stops and frisks, see* notes 439-53 and accompanying text *infra*; and (6) *stops and searches of automobiles, see* notes 454-74 and accompanying text *infra*.

223. *See* note 217 *supra*.

224. Coolidge v. New Hampshire, 403 U.S. 443 (1971).

225. Shadwick v. Tampa, 407 U.S. 345 (1972).

226. PA. R. CRIM. P. 2001.

227. An "issuing authority is any Justice, law or law-trained Municipal Court or Common Pleas Court judge, justice of the peace, or magistrate." PA. R. CRIM. P. 3(f).

228. *See* Whiteley v. Warden, 401 U.S. 560 (1971); Commonwealth v. Connor, 452 Pa. 333, 305 A.2d 341 (1973); Commonwealth v. Jones, 452 Pa. 299, 304 A.2d 684 (1973); Commonwealth v. Krukoff, 223 Pa. Super. 395, 302 A.2d 388 (1973); Commonwealth v. Fisher, 223 Pa. Super. 107, 296 A.2d 848 (1972); Commonwealth v. Billock, 221 Pa. Super. 441, 289

However, *under Pennsylvania Rules* of Criminal Procedure, for any search warrant issued after May 28, 1973, *no oral testimony* before the issuing authority may be considered.[229] Of course, if additional information is added to an affidavit before the affidavit is sworn to before the issuing authority, or is submitted in a separate affidavit, it is perfectly acceptable and can be considered in determining probable cause.[230]

(2) *Complete Description of Person or Premises to be Searched*

A description of the premises to be searched may be by *house number* or by any other method *sufficiently specific* to clearly identify the premises.[231] Where the place to be searched is an apartment or room within a building, the warrant must specify which apartment or room is to be searched. This may also be done by apartment number of specific description.[232]

An incorrect house or apartment number is not fatal where the physical description is sufficiently detailed so that the proper location is clear[233] or where the information as to the location of the premises is derived from false statements of the person whose residence is to be searched.[234] Similarly, if specific information is unavailable, as where there is no reason to believe a residence is a

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A.2d 749 (1972).

Of course, if no oral testimony was presented prior to the issuance of the warrant, the validity of the warrant must turn solely on the adequacy of the information contained in the written affidavits themselves. *Commonwealth v. Bedford*, 451 Pa. 325, 304 A.2d 453 (1972). And, of course, sworn oral testimony, added to the information in the warrant, may still not equal probable cause. *Commonwealth v. Simmons*, 450 Pa. 624, 301 A.2d 819 (1973).

229. PA. R. CRIM. P. 2003(a), (b). *See* Commonwealth v. Milliken, 450 Pa. 310, 300 A.2d 78 (1973).

230. PA. R. CRIM. P. 2003(a) provides that a search warrant may issue upon "one or more affidavits sworn to before the issuing authority." Thus, so long as the information is included prior to being sworn to, it is admissible in determining the validity of the search warrant. In order to avoid possible problems and to facilitate the issuance of warrants, the Philadelphia District Attorney's Office has prepared, and the Philadelphia Police have adopted, a new form to be kept at all courts, including the preliminary arraignment court at the Police Administration Building, to be filled out when information is received after preparation of the warrant or when additional information is thought desirable by the assigned Assistant District Attorney. This affidavit is then submitted together with the original warrant to the issuing authority.

231. Commonwealth v. Connolly, 290 Pa. 181, 138 A.2d 682 (1927).

232. Commonwealth v. Smyser, 205 Pa. Super. 599, 605, 211 A.2d 59, 63 (1965).

233. State v. Bisaccia, 58 N.J. 586, 279 A.2d 675 (1971).

234. State v. Wright, 113 N.J. Super. 79, 272 A.2d 758 (1971).

multi-person dwelling or is not being used as a single unit, a warrant for the whole residence is valid.[235]

A description of a person to be searched may be by name or physical attributes. However, it must be clear whether a particular person or a particular residence, where that person may reside, is to be searched.[236]

(3) *Complete Description of the Things to be Seized*

A search warrant may be issued for contraband, fruits of a crime, property used to commit a crime, or objects dangerous in themselves.[237] It may also be issued for "mere evidence of a crime."[238] The general rule is that items *not mentioned* in the warrant may *not be seized.*[239] However, particularity should not be hypertechnically applied to invalidate a good faith search and it is not required that the items be identified beyond a *general classification.*[240]

A search under a warrant may extend to items reasonably related to the purposes of a search.[241] But it cannot be extended to distinct items that were or should have been anticipated by the affiant.[242]

Items not included in the warrant and nevertheless seized will be excluded from evidence. But failure to include such items does not invalidate the seizure of the included items.[243]

(4) *Probable Cause*

A search warrant affidavit must contain sufficient information upon which the magistrate can independently conclude that there is probable cause to believe that the items sought to be seized can be found at the premises or on the person described.[244] Although

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235. Commonwealth v. Copertino, 209 Pa. Super. 63, 224 A.2d 228 (1966).

236. Commonwealth v. Muscheck, 222 Pa. Super. 348, 294 A.2d 809 (1972).

237. *See* PA. R. CRIM. P. 2002(a), (b); Coolidge v. New Hampshire, 403 U.S. 443 (1971).

238. *See* PA. R. CRIM. P. 2002(c); Warden v. Hayden, 387 U.S. 294 (1967).

239. Commonwealth v. Fiorini, 202 Pa. Super. 88, 195 A.2d 119 (1963).

240. Anglin v. Director, 439 F.2d 1342 (4th Cir. 1971); Commonwealth v. Butler, 448 Pa. 128, 291 A.2d 89 (1972) (bloody clothing); Commonwealth v. Matthews, 446 Pa. 65, 285 A.2d 510 (1971) (knife).

241. United States v. Joseph, 174 F. Supp. 539 (E.D. Pa. 1959), *aff'd*, 278 F.2d 504 (3d Cir. 1960), *cert. denied*, 364 U.S. 823 (1960).

242. Coolidge v. New Hampshire, 403 U.S. 443 (1971). *See* Commonwealth v. Searles, 450 Pa. 384, 302 A.2d 335 (1973) (notebook not included within checkwriting equipment).

243. Commonwealth v. Fiorini, 202 Pa. Super. 88, 195 A.2d 119 (1963). *See* Commonwealth v. Mamon, 449 Pa. 249, 297 A.2d 471 (1972).

244. PA. R. CRIM. P. 2003(a); Commonwealth v. Somershoe, 215 Pa. Super. 246, 257 A.2d 341 (1969). *See* Commonwealth v. Muschek, 222 Pa. Super. 348, 294 A.2d 809 (1972).

the standards for determining probable cause for a search and seizure are the same as to determine probable cause for an arrest,[245] the probable cause in a search warrant must relate to evidence or items to be searched or seized, while probable cause to arrest relates only to a basis to believe a criminal offense has been or is being committed.[246]

Probable cause is *defined* as where an affiant has knowledge of *sufficient facts and circumstances*, gained through *trustworthy information*, to warrant a *man of reasonable caution* in the belief that an offense has been or is being committed and evidence would be found at the described location.[247] Only a probability and not a prima facie showing of criminal activity is required.[248] The affidavits of probable cause must be interpreted in a common sense and realistic fashion. The resolution of doubtful cases should be in favor of the validity of the warrant.[249] The measure is not what might be probable cause to an untrained layman, but what is sufficient in light of the special skill and training of the affiant, especially a policeman.[250]

The affiant may base his request for a warrant on *circumstantial evidence.* If the pieces of information furnish a reasonable basis for criminal activity and evidence of a crime, there is probable cause.[251] Similarly, the affidavit may be derived from *multiple sources*—informants, victims, eye witnesses, official records. If a common sense reading of the affidavit indicates sufficient reason

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245. Whiteley v. Warden, 401 U.S. 560 (1971); Spinelli v. United States, 393 U.S. 410 (1969); Commonwealth v. Smith, 453 Pa. 326, 309 A.2d 413 (1973).

246. *Compare* Spinelli v. United States, 393 U.S. 410 (1969) and Aguilar v. Texas, 378 U.S. 108 (1964), *with* United States v. Rabinowitz, 339 U.S. 56 (1950), *and* Brinegar v. United States, 338 U.S. 160 (1949). *See also* notes 319-422 and accompanying text *infra.*

247. Brinegar v. United States, 338 U.S. 160, 175 (1949); Commonwealth v. Hicks, 434 Pa. 153, 158, 253 A.2d 276, 279 (1969).

248. Beck v. Ohio, 379 U.S. 89 (1964); United States v. Gimelstob, 475 F.2d 157 (3d Cir. 1973); Commonwealth v. Jackson, 450 Pa. 113, 299 A.2d 213 (1973); Commonwealth v. Somershoe, 215 Pa. Super. 246, 257 A.2d 341 (1969).

249. United States v. Ventresca, 380 U.S. 102, 108-09 (1965); Commonwealth v. Billock, 221 Pa. Super. 441, 289 A.2d 749 (1972).

250. Commonwealth v. Johnson, 198 Pa. Super. 51, 182 A.2d 541 (1962), adopting as its opinion 37 Pa. D. & C.2d 301 (Phila. 1961). *See* Commonwealth v. Young, 222 Pa. Super. 355, 294 A.2d 785 (1972).

251. Commonwealth v. Young, 222 Pa. Super. 355, 294 A.2d 785 (1972); Commonwealth v. Whitehouse, 222 Pa. Super. 127, 292 A.2d 469 (1972). *See also* Commonwealth v. DeFlemingue, 450 Pa. 163, 299 A.2d 246 (1973); Commonwealth v. Thomas, 448 Pa. 42, 292 A.2d 352 (1972); Commonwealth v. Devlin, 221 Pa. Super. 175, 289 A.2d 237 (1972).

to believe that evidence related to criminal activity may be found, there is probable cause.[252]

If all the information is derived from the personal knowledge or observation of the affiant, there is no need for any further inquiry. Probable cause is based on the contents of his information and his credibility or the reliability of the information can be observed by the magistrate. However, it is more likely that the information will be, at least in part, based on statements from other sources. This *hearsay* may also be considered if substantiation is shown by:

1) sufficient underlying *circumstances to show* that the informant reached a proper *conclusion that criminal activity is afoot and that evidence would be found* at the named premises.[253] This requirement must be met by setting forth in detail the manner in which the informant received his information or by describing the criminal activity in detail and the evidence related to that activity which the informant observed;[254]

and

2) sufficient underlying *circumstances* upon which the affiant concluded that the *informant was credible or that his information was reliable.*[255] The credibility of the informant may be shown by the informant's past reliability or inherent reliability.[256] Even assuming such credibility can't be shown, the basis for the warrant may be shown through corroboration of the infor-

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252. Commonwealth v. Thomas, 448 Pa. 42, 292 A.2d 352 (1972). *See, e.g.*, Commonwealth v. Mamon, 449 Pa. 249, 297 A.2d 471 (1972); Commonwealth v. Whitehouse, 222 Pa. Super. 127, 292 A.2d 469 (1972); Commonwealth v. Soychak, 221 Pa. Super. 458, 289 A.2d 119 (1972); Commonwealth v. Billock, 221 Pa. Super. 441, 289 A.2d 749 (1972). Of course, merely because there are many pieces of information does not necessarily mean that there is any more than allegations. The information must still be reliable and must indicate a reasonable basis for a belief. *See, e.g.*, Commonwealth v. Emerich, 225 Pa. Super. 163, 310 A.2d 390 (1973); Commonwealth v. Suppa, 223 Pa. Super. 513, 302 A.2d 357 (1973); Commonwealth v. Falk, 221 Pa. Super. 43, 290 A.2d 125 (1972).

253. Spinelli v. United States, 393 U.S. 410 (1969); Aguilar v. Texas, 378 U.S. 108 (1969); Commonwealth v. Emerich, 225 Pa. Super. 163, 310 A.2d 390 (1973); Commonwealth v. Ambers, 225 Pa. Super. 381, 310 A.2d 347 (1973); Commonwealth v. Somershoe, 215 Pa. Super. 246, 249-50, 257 A.2d 341, 343 (1969).

254. Commonwealth v. Ambers, 225 Pa. Super. 381, 310 A.2d 347 (1973); Commonwealth v. Soychak, 221 Pa. Super. 458, 465, 289 A.2d 119, 123 (1972). *See* Commonwealth v. Smith, 453 Pa. 326, 309 A.2d 415 (1973); Commonwealth v. Manduchi, 222 Pa. Super. 562, 295 A.2d 130 (1972) (no basis for source of facts); Commonwealth v. Massie, 221 Pa. Super. 453, 292 A.2d 508 (1972).

255. Spinelli v. United States, 393 U.S. 410 (1969); Aguilar v. Texas, 378 U.S. 108 (1964); Commonwealth v. Emerich, 225 Pa. Super. 163, 310 A.2d 390 (1973); Commonwealth v. Ambers, 225 Pa. Super. 381, 310 A.2d 347 (1973); Commonwealth v. Somershoe, 215 Pa. Super. 246, 249-50, 257 A.2d 341, 343 (1969); Commonwealth v. Payton, 212 Pa. Super. 254, 243 A.2d 202 (1968).

256. Commonwealth v. Ambers, 225 Pa. Super. 381, 310 A.2d 347 (1973); Commonwealth v. Soychak, 221 Pa. Super. 458, 465, 289 A.2d 119, 123 (1972). *See* notes 265-270 *infra.*

> mation to show that the information itself is reliable.[257] Of course, this reliability requirement may be met by a combination of data showing partial credibility of the informant and partial corroboration and thus reliability of the information.[258]

Basis for Conclusion of Criminal Activity and Existence of Evidence

As with information derived from personal knowledge or observation, all that is required is a sufficient basis to indicate that evidence of a crime may be found at a particular location.[259] Specificity by the informant in describing an offense and the informant's personal viewing of the offense and evidence are sufficient.[260] Of course, the informant's description should be read in a common sense manner. If the words clearly indicate to the affiant, and through him to the magistrate, that a crime has been committed and that evidence of the crime can be found, it is sufficient.[261]

In addition to descriptions based on personal observation, the informant may properly base his conclusions of criminal activity and evidence on his own participation in a criminal enterprise,[262] on circumstantial evidence tied to an existing offense,[263] or on statements made by the perpetrators to him.[264]

Basis for Credibility of the Informant or Reliability of Information

The credibility of certain types of informants may be assumed. If the affiant police officer receives information from a fellow po-

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257. United States v. Harris, 403 U.S. 573 (1971); Spinelli v. United States, 393 U.S. 410 (1969); Commonwealth v. Ambers, 225 Pa. Super. 381, 310 A.2d 347 (1973). *See* notes 271-72 *infra*.

258. *Compare* United States v. Harris, 403 U.S. 573 (1971) *with* Adams v. Williams, 407 U.S. 143 (1972). *See* note 276 *infra*.

259. Commonwealth v. Devlin, 221 Pa. Super. 175, 289 A.2d 237 (1972).

260. United States *ex rel.* Henderson v. Mazurkiewicz, 443 F.2d 1135 (3d Cir. 1971); Commonwealth v. Dial, 445 Pa. 251, 285 A.2d 125 (1971); Commonwealth v. Soychak, 221 Pa. Super. 458, 289 A.2d 119 (1972).

261. Commonwealth v. Dial, 445 Pa. 251, 285 A.2d 125 (1971) ("transacting business" may be properly interpreted to mean dealing in dope); Commonwealth v. Soychak, 221 Pa. Super. 458, 289 A.2d 119 (1972) (obvious knowledge of gambling information).

262. United States v. Harris, 403 U.S. 573 (1971); Commonwealth v. Soychak, 221 Pa. Super. 458, 289 A.2d 119 (1972).

263. United States v. Henkel, 451 F.2d 777 (3d Cir. 1971). *See* United States v. McNally, 473 F.2d 934 (3d Cir. 1973); Commonwealth v. Devlin, 221 Pa. Super. 175, 289 A.2d 237 (1972).

264. United States v. Bamberger, 456 F.2d 1119 (3d Cir. 1972); United States *ex rel.* Laws v. Yeager, 448 F.2d 74 (3d Cir. 1971); Commonwealth v. Frisby, 451 Pa. 16, 301 A.2d 610 (1973).

lice officer or other law enforcement official, the information may be relied on. The police are considered a unit and the *collective knowledge of the police* is considered almost as if directly given to the magistrate.[265] Similarly, information from a named victim or eyewitness may be relied upon.[266] If any such "*citizen informant*" wishes to remain confidential, some indication of the person's reputation, employment and prior positive relationship to police is sufficient to indicate that he is credible.[267] Information from a *named* co-defendant, co-conspirator, or accomplice may be considered credible as being "declarations against penal interest."[268]

More detailed information must be shown to support a statement of a police or "*confidential informant.*" The most common method is a recounting of facts tending to show that the informant has provided *accurate information in the past.* For example, it may be shown that prior information has led to prior seizures, prior arrests, *or* prior convictions.[269] An unnamed or confidential informant's credibility can also be shown by his *admission of criminal complicity*—a declaration against penal interest.[270]

Even if the credibility of the informant is not shown or not completely shown, the affidavit may state corroborating information sufficient to justify a finding of probable cause that the information given by the informant on the instant occasion is accurate and reliable.[271] Specific and detailed information can indicate that

265. Whiteley v. Warden, 401 U.S. 560 (1971); United States v. Bianco, 189 F.2d 716 (3d Cir. 1951); Commonwealth v. Kenney, 449 Pa. 562, 297 A.2d 794 (1972). *See* Commonwealth v. Jackson, 450 Pa. 113, 299 A.2d 213 (1973).

266. Hollman v. Rundle, 329 F. Supp. 1052 (E.D. Pa. 1971), *aff'd*, 461 F.2d 758 (3d Cir. 1972); Commonwealth v. Jones, 452 Pa. 299, 304 A.2d 684 (1973); Commonwealth v. Mamon, 449 Pa. 249, 297 A.2d 471 (1972). *See* Commonwealth v. Smith, 452 Pa. 1, 304 A.2d 456 (1973); Commonwealth v. Whitehouse, 222 Pa. Super. 127, 292 A.2d 469 (1972); Commonwealth v. Falk, 221 Pa. Super. 43, 290 A.2d 125 (1972).

267. *See, e.g.*, Commonwealth v. Jones, 452 Pa. 299, 302 A.2d 684 (1973); Commonwealth v. Whitehouse, 222 Pa. Super. 127, 292 A.2d 469 (1972).

268. Hill v. California, 401 U.S. 797 (1971); United States v. Bamberger, 456 F.2d 1119 (3d Cir. 1971); United States *ex rel.* DiRienzo v. Yeager, 443 F.2d 228 (3d Cir. 1971); Commonwealth v. Kenny, 449 Pa. 562, 297 A.2d 794 (1972); Commonwealth v. Matthews, 446 Pa. 65, 285 A.2d 510 (1971); Commonwealth v. Williams, 219 Pa. Super. 109, 280 A.2d 430 (1971). *See* Commonwealth v. Falk, 221 Pa. Super. 43, 290 A.2d 125 (1971).

269. *See* Aguilar v. Texas, 378 U.S. 108, 114 n.5 (1964); Jones v. United States, 362 U.S. 257, 269 (1960); Draper v. United States, 358 U.S. 307 (1959); United States v. Gimelstob, 475 F.2d 157 (3d Cir. 1973); Commonwealth v. Soychak, 221 Pa. Super. 458, 289 A.2d 119 (1972). There is no need to show that the information in the past had led to convictions. Prior successful seizures or arrests are sufficient. People v. Jordain, 10 Ill. App. 3d 46, 294 N.E.2d 3 (1973); Commonwealth v. Ambers, 225 Pa. Super. 381, 310 A.2d 347 (1973); Commonwealth v. Billock, 221 Pa. Super. 441, 289 A.2d 749 (1972).

270. United States v. Harris, 403 U.S. 573 (1971). *See* Commonwealth v. Falk, 221 Pa. Super. 43, 290 A.2d 125 (1972).

271. United States v. Harris, 403 U.S. 573 (1971); Spinelli v. United States, 393 U.S. 410 (1969). *See* Adams v. Williams, 407 U.S. 143 (1972).

there is a basis for the information and that it is therefore reliable.[272] Surveillance by the police or verification through records may corroborate the information.[273] Reputation or past activities of the perpetrator or the premises may be used to verify information.[274] This corroboration may be by actions which are innocent in themselves but which, when put together with the informant's statements, verify the information given.[275] Of course, credibility of the informant and reliability of the information can be shown by a combination of facts relating to the informant or corroboration of his information.[276]

B. *Other Search Warrant Issues*

(1) *Partially Insufficient Warrant*

Of course, if the basis for a search warrant is information obtained illegally from the individual whose property or person is sought to be seized, the warrant is invalid, and any evidence secured through it must be suppressed.[277] However, where probable cause is shown in the warrant, independent of tainted or incomplete evidence, the warrant is still valid.[278]

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272. Draper v. United States, 358 U.S. 307 (1959); United States v. McNally, 473 F.2d 934 (3d Cir. 1973); United States *ex rel.* Laws v. Yeager, 448 F.2d 74 (3d Cir. 1971); State v. Perry, 59 N.J. 383, 283 A.2d 330 (1971). *See* Adams v. Williams, 407 U.S. 143 (1973).

273. United States v. Singleton, 439 F.2d 381 (3d Cir. 1971); United States *ex rel.* Kislin v. New Jersey, 429 F.2d 950 (3d Cir. 1970); Commonwealth v. Frisby, 451 Pa. 16, 301 A.2d 610 (1973); Commonwealth v. Williams, 219 Pa. Super. 109, 280 A.2d 430 (1971).

274. United States v. Harris, 403 U.S. 573 (1971); United States v. McNally, 473 F.2d 934 (3d Cir. 1973); United States *ex rel.* Kislin v. New Jersey, 429 F.2d 950 (3d Cir. 1970); Commonwealth v. Ambers, 225 Pa. Super. 381, 310 A.2d 347 (1973). Of course, it is not sufficient in itself to show a present crime. Commonwealth v. Connor, 452 Pa. 333, 305 A.2d 341 (1973); Commonwealth v. Emerich, 225 Pa. Super. 163, 310 A.2d 390 (1973); Commonwealth v. Suppa, 223 Pa. Super. 513, 302 A.2d 357 (1973).

275. United States *ex rel.* Henderson v. Mazurkiewiz, 443 F.2d 1135 (3d Cir. 1971); United States *ex rel.* Kislin v. New Jersey, 429 F.2d 950 (3d Cir. 1970); Commonwealth v. Ambers, 225 Pa. Super. 381, 310 A.2d 347 (1973) (presence in apartment); Commonwealth v. Billock, 221 Pa. Super. 441, 289 A.2d 749 (1972) (receipt of package in mail).

276. United States v. Harris, 403 U.S. 573 (1971); Commonwealth v. Mamon, 449 Pa. 249, 297 A.2d 471 (1972); Commonwealth v. Ambers, 225 Pa. Super. 381, 310 A.2d 347 (1973).

277. Commonwealth v. Dembo, 451 Pa. 1, 301 A.2d 689 (1973); Commonwealth v. Meadows, 222 Pa. Super. 202, 293 A.2d 365 (1972). Compare the problem of the admissibility of confessions after illegal arrests, searches, or prior confessions. *E.g.*, Wong Sun v. United States, 371 U.S. 471 (1963); *In re* Betrand, 451 Pa. 381, 303 A.2d 486 (1973); Commonwealth v. Rowe, 445 Pa. 454, 282 A.2d 319 (1971); Commonwealth v. Banks, 429 Pa. 53, 239 A.2d 416 (1968).

278. Commonwealth v. Thomas, 444 Pa. 436, 282 A.2d 693 (1971); Com-

The prior illegality, to invalidate the warrant, must relate to the individual against whom the evidence is sought to be introduced. Thus, information gained from an informant through possible violation of that informant's rights cannot eliminate the probable cause basis against another defendant.[279] He simply has no standing to challenge such a violation.[280]

(2) *Disclosure of Informant*

As indicated earlier, probable cause is to be determined by the "four squares" of the warrant and, if permissible by local rules, any additional testimony of the affiant before the magistrate.[281] Factual inaccuracies not going to the integrity of the affidavit will not destroy probable cause.[282] Thus, even if there is later trial testimony different than indicated in the warrant or even an acquittal on the charge described in the warrant, there can still be probable cause.[283]

A defendant has *no* right to secure the name of the informant.[284] While, in Pennsylvania, he has a right to cross-examine the affiant with respect to the prior results of a confidential informant,[285] the only purpose is to test the credibility of the affiant.[286] Such a right of cross-examination does not include disclosure of the identity of the informant, nor of specific enough information that would cause the identity of the informant to be disclosed.[287] Only a showing that the information in the warrant is knowingly false will invalidate the bases for probable cause and thus the warrant.[288]

(3) *Staleness of Information*

The information which gives rise to a determination of probable cause must be closely related in time to the date the warrant

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monwealth v. Ambers, 225 Pa. Super. 381, 310 A.2d 347 (1973); Commonwealth v. Soychak, 221 Pa. Super. 458, 289 A.2d 119 (1972).

279. Commonwealth v. Lewis, 443 Pa. 305, 279 A.2d 26 (1971).

280. Commonwealth v. Williams, 219 Pa. Super. 109, 280 A.2d 430 (1971).

281. Aguilar v. Texas, 378 U.S. 108 (1964); Commonwealth v. Crawley, 209 Pa. Super. 70, 223 A.2d 885 (1966). *See* notes 12-14 and accompanying text *supra.*

282. Rugendorf v. United States, 376 U.S. 528, 532 (1964).

283. United States *ex rel.* Laws v. Yeager, 448 F.2d 74 (3d Cir. 1971); Commonwealth v. Dial, 218 Pa. Super. 248, 276 A.2d 314 (1971), *aff'd on this issue*, 445 Pa. 251, 285 A.2d 125 (1971).

284. McCray v. Illinois, 386 U.S. 300, 307-08 (1967).

285. *Compare* Commonwealth v. Hall, 451 Pa. 201, 302 A.2d 342 (1973); *with* State v. Petillo, 61 N.J. 165, 293 A.2d 649 (1972).

286. Commonwealth v. Hall, 451 Pa. 201, 302 A.2d 342 (1973); Commonwealth v. Ambers, 225 Pa. Super. 341, 310 A.2d 347 (1973).

287. *See* Commonwealth v. Ambers, 225 Pa. Super. 341, 310 A.2d 347 (1973).

288. Commonwealth v. D'Angelo, 437 Pa. 331, 263 A.2d 441 (1970).

is issued.[289] Probable cause must be shown to *presently exist* not merely what might have been a reasonable basis days ago.[290] Of course, prior information may be updated by surveillance.[291]

C. *Execution of the Warrant*

(1) *Knock and Announce Rule*

In order to assure the right of privacy, police officers must give every opportunity to the occupant to voluntarily surrender this right.[292] While Pennsylvania law is unclear as to whether a trick or ruse may be used for entry,[293] ordinarily a third party may not be used to secure entrance on a warrant without giving the occupant an opportunity to voluntarily respond to it.[294] After the resident responds to knocking, the police may announce their purpose, deliver the warrant, and commence their search.[295] Before forcibly entering a premises, they must knock, announce their identity and purpose, and wait a reasonable period of time for a response.[296] There is no requirement that the police await the arrival of the resident. A search may be conducted pursuant to a valid warrant even in the known absence of the occupant.[297]

Exigent circumstances may eliminate the requirement for compliance with the knock and announce rule[298]:

(1) If the police have a reasonable belief that *evidence will be destroyed*, they may enter immediately or as soon as that belief is formed.[299] The mere fact that a warrant is for lottery paper or

289. Commonwealth v. Shaw, 444 Pa. 110, 113, 281 A.2d 897 (1971).
290. Commonwealth v. Connor, 452 Pa. 333, 305 A.2d 341 (1973); Commonwealth v. Bove, 221 Pa. Super. 345, 293 A.2d 67 (1972).
291. *See* Commonwealth v. Bove, 221 Pa. Super. 345, 293 A.2d 67 (1972).
292. Commonwealth v. Ambers, 225 Pa. Super. 341, 310 A.2d 347 (1973).
293. Commonwealth v. Riccardi, 220 Pa. Super. 72, 283 A.2d 719 (1971).
294. Commonwealth v. Riccardi, 220 Pa. Super. 72, 283 A.2d 719 (1971); Commonwealth v. McCloskey, 217 Pa. Super. 432, 272 A.2d 271 (1970).
295. Commonwealth v. Billock, 221 Pa. Super. 441, 289 A.2d 749 (1972).
296. Commonwealth v. DeMichel. 442 Pa. 553, 277 A.2d 159 (1971); Commonwealth v. Newman, 429 Pa. 441, 240 A.2d 795 (1968); Commonwealth v. McCloskey, 217 Pa. Super. 432, 272 A.2d 271 (1970).
297. United States v. Gervato, 474 F.2d 40 (3d Cir. 1973).
298. Ker v. California, 374 U.S. 23 (1963); Miller v. United States, 357 U.S. 301 (1958); Commonwealth v. Newman, 429 Pa. 441, 240 A.2d 795 (1968).
299. Commonwealth v. McAleese, 214 Pa. Super. 228, 252 A.2d 380 (1969). *See* Commonwealth v. Johnson, 223 Pa. Super. 83, 289 A.2d 733 (1972); Commonwealth v. Soychak, 221 Pa. Super. 458, 289 A.2d 119 (1972).

for drugs—which are easily disposable—does not eliminate the requirement of waiting a reasonable time for a response.[300] However, actions observed or noises heard, such as a slammed door,[301] a person running away,[302] a lie about being alone,[303] may justify quick entry to avoid destruction of evidence.[304]

(2) If the police have a reasonable belief that strict compliance with the requirements would cause *peril* or *injury* to them or bystanders, they may dispense with the knock, announce and wait rule.[305] Such a belief would be justified, for example, where guns or explosives are known to be available.[306]

(3) If the police are presented with facts making them reasonably certain that the occupants know of their identity and purpose, the knock, announce, and wait rule need not be complied with.[307] Such "*useless gestures*" would not be required where there is a scream of "police" and running,[308] where a door is slammed after the badge and warrant are shown,[309] or where visual observation of the uniformed or easily identifiable police officers is made by the occupant and delay tactics are attempted.[310]

(2) *Timing of Search*

There is no requirement that a search warrant be executed when occupants are present.[311] Under local rules, a search warrant can be executed only in the day-time, unless justification for a night-time search is included within the warrant and specific authorization is given for such a nighttime search.[312]

Once a warrant is obtained, it must be executed promptly.[313] Failure to do so makes the probable cause basis for the search stale.[314] Under Pennsylvania Rules, no warrant may be executed more than two days after its issuance.[315] Of course, the warrant

300. Commonwealth v. DeMichel, 442 Pa. 553, 277 A.2d 159 (1971); Commonwealth v. Riccardi, 220 Pa. Super. 72, 283 A.2d 719 (1971).
301. Commonwealth v. Fisher, 223 Pa. Super. 107, 296 A.2d 848 (1972).
302. Commonwealth v. Dial, 445 Pa. 251, 285 A.2d 125 (1971); Commonwealth v. Ambers, 225 Pa. Super. 381, 310 A.2d 347 (1973).
303. Commonwealth v. Pugh, 223 Pa. Super. 112, 296 A.2d 864 (1972).
304. *See* Commonwealth v. McAleese, 214 Pa. Super. 228, 252 A.2d 380 (1969).
305. *See* Commonwealth v. Johnson, 223 Pa. Super. 83, 289 A.2d 733 (1972).
306. United States v. Mendez, 437 F.2d 85 (5th Cir. 1971).
307. *See* Commonwealth v. Fisher, 223 Pa. Super. 107, 296 A.2d 848 (1972); Commonwealth v. Johnson, 223 Pa. Super. 83, 289 A.2d 733 (1972).
308. United States v. Singleton, 439 F.2d 381 (3d Cir. 1971).
309. Commonwealth v. Fisher, 223 Pa. Super. 107, 296 A.2d 848 (1972); Commonwealth v. Johnson, 223 Pa. Super. 83, 289 A.2d 733 (1972).
310. Commonwealth v. Pugh, 223 Pa. Super. 112, 296 A.2d 864 (1972).
311. United States v. Gervato, 474 F.2d 40 (3d Cir. 1973).
312. PA. R. CRIM. P. 2003(c). *See* United States *ex rel.* Boyance v. Myers, 398 F.2d 896 (3d Cir. 1968).
313. Commonwealth v. McCants, 450 Pa. 245, 299 A.2d 283 (1973).
314. *Id.*
315. PA. R. CRIM. P. 2005.

may still be found stale within that period. Proper reasons must be given for delay.[316]

(3) *Scope of Search*

In addition to the requirements established by the "specificity of description of items to be seized" standard discussed earlier,[317] other rules apply to "plain view" seizure during execution of a warrant. Police may seize contraband, weapons, or items dangerous in themselves,[318] provided that these items, are discovered in a place where it is reasonable to assume that such an item could be found.[319] Of course, once the items named in the warrant are obtained, the police cannot continue with a now "exploratory search" in the hope of finding such items.[320]

X. Exceptions to the Search Warrant Requirement

As indicated earlier,[321] a search and seizure warrant is generally necessary to search a premises, person or item. However, because of the needs of society and a common-sense reading of the Constitution, there have been exceptions to that rule for searches by consent, searches in an emergency, seizures of items in plain view, searches incident to an arrest, stops and frisks and stops and searches of automobiles.

A. *Consent Searches*

If one voluntarily consents to a search, there is no need for a warrant.[322] Of course, the police cannot claim a consent if a defendant peaceably complies with a search warrant which later turns out to have been invalid.[323]

Consent may be implied from the defendant's formal agreement,[324] oral agreement,[325] or actions.[326] If specific words or deeds

316. *See* United States v. Van Leeuwen, 397 U.S. 249 (1970).
317. *See* notes 237-43 and accompanying text *supra.*
318. Coolidge v. New Hampshire, 403 U.S. 443 (1971); Anglin v. Director, Paxtuxent Inst., 439 F.2d 1342 (4th Cir. 1971).
319. *See* Coolidge v. New Hampshire, 403 U.S. 443 (1971).
320. United States v. Lazar, 347 F. Supp. 225 (E.D. Pa. 1972).
321. *See* note 221 *supra.*
322. Schneckloth v. Bustamonte, 412 U.S. 218 (1973); Commonwealth v. Fox, 445 Pa. 76, 282 A.2d 341 (1971).
323. Bumper v. North Carolina, 391 U.S. 543 (1968); United States *ex rel.* Gockley v. Myers, 378 F.2d 398 (3d Cir. 1967).
324. *Cf.* Commonwealth v. Mamon, 449 Pa. 249, 297 A.2d 471 (1972).
325. United States v. Genareo, 467 F.2d 476 (3d Cir. 1972); Commonwealth v. Watkins, 222 Pa. Super. 146, 292 A.2d 505 (1972) ("here is what you want").

by an individual clearly indicate an intention to allow a search and seizure, the police may assume there is consent and commence their work.[327]

Of course, a consent must be voluntary and not secured through coercion or duress.[328] As with a confession, all the circumstances of the relinquishment by the individual are to be considered in determining voluntariness.[329] The fact that the police conceal their intentions does not indicate coercion or duress.[330] The mere fact that a person is confronted by police, is "in custody," is being questioned, or is "under arrest" does not preclude a valid consensual search.[331] Of course, confrontation by large numbers of police, with guns drawn, and a statement reasonably understood to be a demand rather than a request, can indicate coercion or duress and invalidate an acquiescence to a search.[332]

There is no requirement that a defendant be advised that he has a right not to consent,[333] nor that a warrant could or couldn't, would or wouldn't be obtained.[334] Moreover, there is no requirement that a defendant be given his "Miranda warnings" before a consent is sought.[335] Of course, such warnings followed by acquiescence are a good indication of a voluntary consent.[336] However, if a defendant invokes his right to silence, "consent" derived from questioning thereafter is not voluntary.[337]

A voluntary consent may be gotten prospectively, as for ex-

326. United States v. Fields, 458 F.2d 1194 (3d Cir. 1972) (indicating bag to police officer); United States v. Gaines, 441 F.2d 1122 (2d Cir. 1971) (pointing); Commonwealth v. Watkins, 222 Pa. Super. 146, 292 A.2d 505 (1972) (opens trunk).

327. United States v. Fields, 458 F.2d 1194 (3d Cir. 1972); Commonwealth v. Watkins, 222 Pa. Super. 146, 292 A.2d 505 (1972).

328. Schneckloth v. Bustamonte, 412 U.S. 218 (1973); Commonwealth v. Mamon, 449 Pa. 249, 297 A.2d 471 (1972).

329. Schneckloth v. Bustamonte, 412 U.S. 218 (1973); United States v. Nikrasch, 367 F.2d 740 (7th Cir. 1966); Commonwealth v. Mamon, 449 Pa. 249, 297 A.2d 471 (1972); Commonwealth v. Harris, 429 Pa. 215, 239 A.2d 290 (1969).

330. Brown v. Brierley, 438 F.2d 954 (3d Cir. 1971); Commonwealth v. Brown, 437 Pa. 1, 261 A.2d 879 (1970).

331. United States *ex rel.* Harris v. Hendricks, 423 F.2d 1096 (3d Cir. 1970) (arrest); Commonwealth v. Fox, 445 Pa. 76, 282 A.2d 341 (1971) (questioning); Commonwealth v. Petrisko, 442 Pa. 575, 275 A.2d 46 (1971) (police questioning).

332. *See, e.g.*, United States v. Wilcox, 357 F. Supp. 514 (E.D. Pa. 1973).

333. Schneckloth v. Bustamonte, 412 U.S. 218 (1973); United States *ex rel.* Harris v. Hendricks, 423 F.2d 1096 (3d Cir. 1970).

334. United States v. Curiale, 414 F.2d 744 (2d Cir. 1969); United States v. Morgan, 306 F. Supp. 107 (S.D. Cal. 1969).

335. United States *ex rel.* Harris v. Hendricks, 423 F.2d 1096 (3d Cir. 1970); Commonwealth v. Fox, 445 Pa. 76, 282 A.2d 341 (1971); Commonwealth v. Petrisko, 442 Pa. 575, 275 A.2d 46 (1971); Commonwealth v. Anderson, 208 Pa. Super. 323, 222 A.2d 495 (1966).

336. Commonwealth v. Fox, 445 Pa. 76, 282 A.2d 341 (1970); Commonwealth v. Brown, 437 Pa. 1, 261 A.2d 879 (1970). *See* Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

337. *See* Miranda v. Arizona, 384 U.S. 436 (1966).

ample, where it is required in order to receive a state license.[338] But the "statutory consent" must be clear as to scope and if there is an option of refusal, that option must be included.[339]

Any person who has the right to control and use of a premises or object may consent to a search even though a joint possessor or user later challenges the consent.[340] Thus, for example, a co-tenant or co-owner, mother, wife or roommate may consent to a search of a defendant's premises.[341] Of course, if an individual has clear exclusive control of a specific locus or container, another may not consent to a search of those items over which he has no authority to exercise control.[342] If the private citizen turns the defendant's property over to the police, the seizure is lawful as there has been no deprivation by the *state* of a defendant's rights.[343] Similarly, where there has been a clear abandonment of property or premises, the possessor, landlord, hotel owner or mortgage company may consent to the search, even if the contract to lease, hire or buy has not yet expired.[344] Without such abandonment, the other may not consent.[345]

B. *Emergency Searches*

As probable cause and warrant requirements must be read in a common-sense and practical manner, certain fact situations indicating an emergency need for a prompt search and seizure justify warrantless searches.[346] Thus, for example, where delay in securing a warrant would cause the loss or destruction of evidence, a

338. *See* Commonwealth v. Brown, 225 Pa. Super. 289, 302 A.2d 475 (1973).

339. *See* Commonwealth v. Wolbert, 224 Pa. Super. 361, 308 A.2d 120 (1973); Commonwealth v. Brown, 225 Pa. Super. 289, 302 A.2d 475 (1973).

340. United States v. Matlock, U.S. , 94 S. Ct. 988 (1974); United States v. Fields, 458 F.2d 1194 (3d Cir. 1972); Commonwealth v. Kontos, 442 Pa. 343, 276 A.2d 830 (1971).

341. United States *ex rel.* McKenna v. Myers, 232 F. Supp. 65 (E.D. Pa. 1964); Commonwealth *ex rel.* Cabey v. Rundle, 432 Pa. 466, 248 A.2d 197 (1968); Commonwealth v. Rhoads, 225 Pa. Super. 208, 310 A.2d 406 (1973); Commonwealth v. McKenna, 202 Pa. Super. 360, 195 A.2d 817 (1963).

342. Frazier v. Cupp, 394 U.S. 731 (1969); Commonwealth v. Storck, 442 Pa. 197, 275 A.2d 362 (1971).

343. Coolidge v. New Hampshire, 403 U.S. 443 (1971); Commonwealth v. Ross, 452 Pa. 500, 307 A.2d 898 (1973).

344. Abel v. United States, 362 U.S. 217 (1960); United States v. Fields, 458 F.2d 1194 (3d Cir. 1972); Commonwealth v. Coyle, 415 Pa. 379, 203 A.2d 782 (1964).

345. Commonwealth v. McCloskey, 217 Pa. Super. 432, 272 A.2d 271 (1970).

346. *Compare* Cupp v. Murphy, 412 U.S. 291 (1973) *and* United States v. Holiday, 457 F.2d 912 (3d Cir. 1972), *with* Commonwealth v. Linde, 448 Pa. 230, 293 A.2d 62 (1972).

warrantless search would be lawful.[347] Similarly, when police are seeking a fleeing felon, they may make warrantless entries, based on a probable cause to believe the individual is in a particular location.[348] If police believe that there is danger to themselves, or third persons, they may enter premises without a warrant.[349]

Certain "emergency exceptions" to the requirement of warrants and even probable cause have been established by law. Thus, for example, federal officials have the right to make warrantless searches of automobiles and other vehicles near the boundaries of the United States.[350] Police in Pennsylvania are authorized to stop any vehicle at any time.[351] As these provisions are in sharp conflict with right of privacy established by the Fourth Amendment, they must be limited in scope and narrowly construed.[352] Similarly, certain public dangers such as hijacking, allow warrantless stops and searches of persons.[353] In addition, certain health or safety needs justify warrantless searches, sometimes even without probable cause.[354]

Administrative needs to deter and investigate crime also create an emergency exception. Thus, police may make a warrantless search of the entire crime scene for evidence.[355]

C. *Plain View Searches*

Where police are justifiably in a place and see items that can be seized, they may seize them without a warrant.[356] In such situations, there is no search, as the items are in plain view.[357] However, police must have probable cause at the time of the "plain view" to believe that the items consitute contraband, stolen prop-

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347. Cupp v. Murphy, 412 U.S. 291 (1973); Schmerber v. California, 384 U.S. 757, 770 (1966); United States v. Davis, 461 F.2d 1026 (3d Cir. 1972); United States *ex rel.* McNeil v. Rundle, 325 F. Supp. 672 (E.D. Pa. 1971).

348. Warden v. Hayden, 387 U.S. 294 (1967).

349. *See* United States v. Holiday, 457 F.2d 912 (3d Cir. 1972).

350. *See* Henderson v. United States, 390 F.2d 805 (9th Cir. 1967); 19 U.S.C. § 1581(a) (1965).

351. PA. STAT. ANN. tit. 75, § 1221(d) (1971).

352. *See* Almeida-Sanchez v. United States, 413 U.S. 266 (1973) (border searches); Commonwealth v. Swanger, 453 Pa. 107, 307 A.2d 875 (1973).

353. *See, e.g.*, United States v. Rubin, 474 F.2d 262 (3d Cir. 1973).

354. *Compare* United States v. Biswell, 406 U.S. 311 (1972), *with* Camara v. Municipal Court, 387 U.S. 523 (1967), *and* Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970).

355. Steigler v. Anderson, 360 F. Supp. 1286 (D. Del. 1973); State v. Vader, 114 N.J. Super. 260, 276 A.2d 151 (1971); State v. Oakes, 129 Vt. 241, 276 A.2d 18 (1971). *See* United States v. Estese, 479 F.2d 1273 (6th Cir. 1973); United States v. Barone, 330 F.2d 543 (2d Cir. 1964).

356. United States v. Horton, 328 F.2d 132 (3d Cir. 1964), *cert. denied*, Edgar v. United States, 377 U.S. 970 (1964); Commonwealth v. Davenport, 453 Pa. 235, 308 A.2d 85 (1973); Commonwealth v. Watkins, 217 Pa. Super. 332, 272 A.2d 21 (1970); Commonwealth *ex rel.* Bowers v. Rundle, 200 Pa. Super. 496, 189 A.2d 910 (1973).

357. *See* United States v. Holiday, 457 F.2d 912 (3d Cir. 1972); Commonwealth v. Rota, 222 Pa. Super. 163, 292 A.2d 496 (1972).

erty, weapons, or evidence of a crime.[358]

The items must be in open view or else come into view during the course of an independent lawful stop, search, or investigation for other items or an individual.[359] Thus, items observed during a warrantless emergency entry into premises[360] or as a result of a probable cause arrest[361] of a defendant may be lawfully seized. Of course, items abandoned by an individual are no longer in his possession and observation of such items is not an invasion of that individual's right to privacy.[362]

Plain view must be inadvertent.[363] There must be a lawful reason to be in the place to view the items.[364] Thus, abandonment coerced by unlawful police actions may not be used as a basis to uphold seizure of evidence.[365] Thus, for example, a routine police stop of an automobile will not be a justifiable basis for seizure of evidence that came into plain view or was abandoned as a result of that stop.[366] However, a stop of a vehicle because of specific violations of the motor vehicle or criminal code would be proper and the seizure of evidence that came into plain view as a result of that stop would be lawful.[367]

Plain view does not hibernate at sunset. Police may properly use lights or a flashlight once properly in a place where he can observe. Evidence seen as a result of increased vision from that light is still in plain view and may be seized.[368]

D. *Searches Incident to an Arrest*

When police lawfully make an arrest, they may make a search incident to and contemporaneous with that arrest.[369] A lawful ar-

358. Commonwealth v. Bowers, 217 Pa. Super. 317, 274 A.2d 546 (1970).
359. *See* United States v. Welsch, 446 F.2d 220 (10th Cir. 1971); Commonwealth v. Smith, 443 Pa. 151, 277 A.2d 807 (1971).
360. United States v. Holiday, 457 F.2d 912 (3d Cir. 1972).
361. Commonwealth v. Davenport, 453 Pa. 235, 308 A.2d 85 (1973); Commonwealth v. Rota, 222 Pa. Super. 163, 292 A.2d 496 (1972); Commonwealth v. Watkins, 222 Pa. Super. 146, 292 A.2d 505 (1972).
362. Commonwealth v. Tatro, 223 Pa. Super. 278, 297 A.2d 139 (1972).
363. Coolidge v. New Hampshire, 403 U.S. 443 (1971).
364. Commonwealth v. Davenport, 453 Pa. 235, 308 A.2d 85 (1973).
365. Commonwealth v. Pollard, 450 Pa. 138, 299 A.2d 233 (1973).
366. Commonwealth v. Swanger, 453 Pa. 107, 307 A.2d 875 (1973).
367. Commonwealth v. Watkins, 222 Pa. Super. 146, 292 A.2d 505 (1972); Commonwealth v. Mitchell, 222 Pa. Super. 335, 295 A.2d 90 (1972).
368. Commonwealth v. DeJesus, 226 Pa. Super. 79, 310 A.2d 323 (1973). *See* Williams v. United States, 404 F.2d 493 (5th Cir. 1968).
369. *See* Commonwealth v. White, 447 Pa. 331, 290 A.2d 246 (1972); Commonwealth v. Smith, 443 Pa. 151, 277 A.2d 807 (1971).

rest must be based on probable cause[370] and in certain situations must be made with an arrest warrant. Even if a search warrant or arrest warrant was invalid, however, the police may still have independent probable cause to arrest and they may make a valid search incidental to such a probable cause arrest.[371]

(1) *Misdemeanor—Felony Distinctions*

Police may arrest a defendant *without a warrant* and conduct an incidental and contemporaneous search[372] whenever they have a reasonable belief that a *felony* has been or is being committed.[373] Similarly, the police may arrest a *misdemeanant, without a warrant,* whenever they have a reasonable belief that the offense is being committed in their presence.[374] No arrest warrant is required unless it is for a misdemeanor not committed in the officer's presence.[375]

When a misdemeanor is not committed in the officer's presence, an arrest warrant must be obtained.[376] While police officers may arrest a felon after hot pursuit into a neighboring jurisdiction, they may not pursue and arrest a misdemeanant, whether with or without a warrant.[377] Such defendants can only be arrested, as with felons not arrested in hot pursuit, by police officers of the jurisdiction to which the defendant has fled and the defendants may be returned to the local jurisdiction in accordance with the rules of interstate extradition or intrastate transfer.[378]

(2) *Probable Cause to Arrest*

As indicated earlier,[379] the standards to determine probable

370. *See In re* Betrand, 451 Pa. 381, 303 A.2d 486 (1973); Commonwealth v. Jackson, 450 Pa. 113, 299 A.2d 213 (1973).

371. Chrisman v. Field, 448 F.2d 175 (9th Cir. 1971); Commonwealth v. Hughes, 219 Pa. Super. 181, 280 A.2d 556 (1971).

372. Chimel v. California, 395 U.S. 752 (1969) ("incident to an arrest"); Stoner v. California, 376 U.S. 483 (1964) ("contemporaneous with an arrest").

373. Commonwealth v. Jackson, 450 Pa. 113, 299 Pa. 213 (1973); Commonwealth v. Friel, 211 Pa. Super. 11, 234 A.2d 22 (1967); PA. R. CRIM. P. 101(2).

374. Commonwealth v. Hargrave, 212 Pa. Super. 167, 240 A.2d 570 (1968); Commonwealth v. Garrick, 210 Pa. Super. 124, 232 A.2d 8 (1967); PA. R. CRIM. P. 101(3).

375. Commonwealth v. Jackson, 450 Pa. 113, 299 A.2d 213 (1973); Commonwealth v. Carter, 444 Pa. 405, 282 A.2d 375 (1971); Commonwealth *ex rel.* Whiting v. Rundle, 414 Pa. 17, 198 A.2d 568 (1969). What is "in the officer's presence" depends on what he observes on view and does not include statements received, even from a defendant. *See* Commonwealth v. Jacoby, 226 Pa. Super. 19, 311 A.2d 666 (1973).

376. Commonwealth v. Brown, 225 Pa. Super. 289, 302 A.2d 475 (1973); Commonwealth v. Reeves, 223 Pa. Super. 51, 297 A.2d 142 (1972).

377. Commonwealth v. Troutman, 223 Pa. Super. 509, 302 A.2d 430 (1973).

378. *See* U.S. CONST. art. IV, § 2; PA. STAT. ANN. tit. 19, § 191.1 *et seq.* (1969) (extradition). *See* PA. R. CRIM. P. 123 (intrastate rendition).

379. *See* notes 245-46 and accompanying text *supra.*

cause to arrest are the same as the standards to determine probable cause for a search warrant.[380] However, the probable cause to arrest need only relate to a basis for believing that a criminal offense has been or is being committed.[381] Of course, information related to the possession of contraband or weapons indicates the existence of such a criminal offense.[382] As with a search warrant,[383] only a probability and not a prima facie showing of criminal activity is required.[384] If the officer has personal knowledge or reasonably trustworthy information, sufficient to warrant a man of reasonable caution, that an individual has committed or is committing an offense, he may arrest him.[385] When evaluating this "reasonable basis", the measure is what is sufficient in light of the special skill and training of the police officer.[386]

Unlike search warrants, which are usually based on collected pieces of information from numerous informants, arrests are usually based on personal observation of the police officers.[387] Such personal observation can, of course, be sufficient to make out probable cause.[388] Of course, mere surmise or hunch of a criminal offense is insufficient.[389] Even a reasonable suspicion will allow only a pat-down or stop and frisk.[390] In order to indicate probable cause, the police officer's observations must indicate the existence of a

380. Whiteley v. Warden, 401 U.S. 560, 566 (1971); Spinelli v. United States, 393 U.S. 410, 417 (1969); Commonwealth v. Smith, 453 Pa. 306, 309 A.2d 412 (1973).

381. Brinegar v. United States, 338 U.S. 160 (1949); Commonwealth v. Hicks, 434 Pa. 153, 253 A.2d 276 (1969).

382. *See, e.g.*, Adams v. Williams, 407 U.S. 143 (1972) (gun); Commonwealth v. Young, 222 Pa. Super. 355, 294 A.2d 785 (1972) (narcotics); Commonwealth v. Devlin, 221 Pa. Super. 175, 289 A.2d 237 (1972).

383. *See* note 248 and accompanying text *supra*.

384. Commonwealth v. Jackson, 450 Pa. 113, 299 A.2d 213 (1973); Commonwealth v. Anderson, 224 Pa. Super. 19, 302 A.2d 504 (1973); Commonwealth v. Devlin, 221 Pa. Super. 175, 289 A.2d 237 (1972).

385. Brinegar v. United States, 338 U.S. 160 (1949); Commonwealth v. Hicks, 434 Pa. 153, 253 A.2d 276 (1969).

386. *See* Commonwealth v. Young, 222 Pa. Super. 355, 294 A.2d 785 (1972).

387. *See, e.g.*, Commonwealth v. Young, 222 Pa. Super. 355, 294 A.2d 785 (1972); Commonwealth v. Mitchell, 222 Pa. Super. 335, 295 A.2d 90 (1972); Commonwealth v. Browne, 221 Pa. Super. 368, 292 A.2d 487 (1972).

388. Commonwealth v. Young, 222 Pa. Super. 355, 294 A.2d 785 (1972); Commonwealth v. Beatty, 216 Pa. Super. 144, 264 A.2d 184 (1970).

389. *See* Commonwealth v. Hicks, 434 Pa. 153, 253 A.2d 276 (1969); Commonwealth v. Ceravolo, 224 Pa. Super. 464, 307 A.2d 288 (1973) ("might be narcotics"); *In re* Harvey, 222 Pa. Super. 222, 295 A.2d 93 (1972); Commonwealth v. Meadows, 222 Pa. Super. 202, 293 A.2d 365 (1972).

390. *See* Terry v. Ohio, 392 U.S. 1 (1968); Commonwealth v. Hicks, 434 Pa. 153, 253 A.2d 276 (1969). *Cf.* Commonwealth v. Berrios, 437 Pa. 338, 263 A.2d 342 (1970).

crime or contraband and a particular person's tie to that crime or contraband.[391] Thus, prior criminal activities by an individual are insufficient to justify probable cause that he is committing a crime now or has recently committed an unsolved crime.[392] Similarly, flight or concealment from a police officer is insufficient to alone justify an arrest,[393] although, together with other facts, it may be sufficient.[394]

When an "arrest" occurs, authorizing an incidental search, is a legal question and does not depend on whether an officer informs the accused of his intention to make an arrest, the cause thereof, or the exact charge.[395] Nor does it depend on whether an officer believes that he is making an arrest or that he is making an arrest for a particular crime.[396] The subjective state of mind of the officer is irrelevant. When and if a lawful arrest occurs must be determined by the court from the facts and circumstances.[397]

While lawful arrest cannot be a mere sham, done solely to secure an incidental search,[398] the mere fact that there is no arrest on the original charge for which there was an incidental search, or that there was a later acquittal, or that a more serious charge is prosecuted, does not mean that there was not probable cause to arrest at the time of the original arrest, affording a proper basis for an incidental search.[399]

Probable cause to arrest may be based not only on personal observation but, like a warrant, may be based on circumstantial evidence,[400] official records,[401] statements of victims and eyewitnesses,[402] information obtained from named and unnamed inform-

391. Commonwealth v. Browne, 221 Pa. Super. 368, 292 A.2d 487 (1972); Commonwealth v. Howell, 213 Pa. Super. 33, 245 A.2d 680 (1968).

392. *See* Commonwealth v. Connor, 452 Pa. 333, 305 A.2d 341 (1973); Commonwealth v. Suppa, 223 Pa. Super. 513, 302 A.2d 357 (1973).

393. Commonwealth v. Pegram, 450 Pa. 590, 301 A.2d 695 (1973).

394. Commonwealth v. Mitchell, 222 Pa. Super. 335, 295 A.2d 90 (1972).

395. Sibron v. New York, 392 U.S. 40 (1968); Commonwealth v. White, 447 Pa. 331, 290 A.2d 246 (1972); Commonwealth v. Negri, 414 Pa. 21, 198 A.2d 595 (1964).

396. Commonwealth v. White, 447 Pa. 331, 290 A.2d 246 (1972).

397. Cupp v. Murphy, 412 U.S. 291 (1973); United States v. Hobby, 275 A.2d 235 (D.C. Ct. App. 1971).

398. United States *ex rel.* Gockley v. Myers, 450 F.2d 232 (3d Cir. 1971). *See* Commonwealth v. Freeman, 222 Pa. Super. 178, 293 A.2d 84 (1972).

399. Commonwealth v. Macek, 218 Pa. Super. 124, 279 A.2d 772 (1971). *See* Cady v. Dombrowski, 413 U.S. 433 (1973); Commonwealth v. Spriggs, 224 Pa. Super. 76, 302 A.2d 442 (1973).

400. Commonwealth v. DeFleminque, 450 Pa. 163, 299 A.2d 246 (1973); Commonwealth v. Browne, 221 Pa. Super. 368, 292 A.2d 487 (1972); Commonwealth v. Howell, 213 Pa. Super. 33, 245 A.2d 680 (1968).

401. Commonwealth v. Mitchell, 222 Pa. Super. 335, 295 A.2d 90 (1972) (stolen car check).

402. Commonwealth v. Jones, 452 Pa. 299, 304 A.2d 684 (1973); Commonwealth v. Smith, 452 Pa. 1, 304 A.2d 456 (1973); Commonwealth v. Whitehouse, 222 Pa. Super. 127, 292 A.2d 469 (1972).

ants,[403] or a combination of these sources.[404] Of course, in evaluating the basis for an arrest, the collective information of the police is to be considered—not only the arresting officer's information.[405]

If information comes from eyewitnesses or victims, a statement of an offense together with a description specific enough to make an identification are all that is required.[406] If information is derived from other informants, the hearsay may be considered as a basis for an arrest if: (1) there is sufficient basis to believe the informant's facts show a crime was committed or is being committed and that a particular person is the perpetrator;[407] *and* (2) there is a sufficient basis to believe that the particular informant is credible or that his information is reliable.[408] Like a search warrant,[409] the *conclusion of criminal activity* may be based on the informant's personal observation,[410] the informant's circumstantial facts description,[411] or the informant's receipt of statements made by perpetrators to him.[412] Again, like a search warrant,[413] the *credibility of the informant* may be shown by naming the informant and his reputation, status in the community, prior relationship to the police,[414] or inculpatory admission to the police.[415] The credibility of a *confidential informant* can be shown by his previous reliabil-

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403. *See, e.g.*, Commonwealth v. Devlin, 221 Pa. Super. 175, 289 A.2d 237 (1972).

404. *See* Commonwealth v. Frisby, 451 Pa. 16, 301 A.2d 610 (1973); Commonwealth v. Gilmore, 447 Pa. 21, 288 A.2d 757 (1972).

405. Commonwealth v. Jackson, 450 Pa. 113, 299 Pa. 213 (1973); Commonwealth v. Kenney, 449 Pa. 562, 297 A.2d 794 (1972).

406. *See* Commonwealth v. Sharpe, 449 Pa. 35, 296 A.2d 519 (1972); Commonwealth v. Gilmore, 447 Pa. 21, 288 A.2d 757 (1972).

407. Brinegar v. United States, 338 U.S. 160 (1949); Commonwealth v. Frisby, 451 Pa. 16, 301 A.2d 610 (1973). *See* Commonwealth v. Massie, 221 Pa. Super. 453, 292 A.2d 508 (1972) (no facts to show basis for belief in crime); Commonwealth v. Smith, 453 Pa. 326, 309 A.2d 413 (1973) (informant "found out").

408. Ker v. California, 374 U.S. 23 (1963); Draper v. United States, 358 U.S. 307 (1959). *See In re* Betrand, 451 Pa. 381, 303 A.2d 486 (1973) (anonymous tip insufficient); Commonwealth v. Massie, 221 Pa. Super. 453, 292 A.2d 508 (1972) (no showing of credibility).

409. *See* notes 259-64 and accompanying text *supra*.

410. Commonwealth v. White, 447 Pa. 331, 290 A.2d 246 (1972); Commonwealth v. Devlin, 221 Pa. Super. 175, 289 A.2d 237 (1972).

411. *See* Commonwealth v. Devlin, 221 Pa. Super. 175, 289 A.2d 237 (1972).

412. Commonwealth v. Frisby, 451 Pa. 16, 301 A.2d 610 (1973).

413. *See* notes 265-76 and accompanying text *supra*.

414. *See* Commonwealth v. Jones, 452 Pa. 299, 304 A.2d 684 (1973); Commonwealth v. Whitehouse, 222 Pa. Super. 127, 292 A.2d 469 (1972).

415. Commonwealth v. Kenney, 449 Pa. 562, 297 A.2d 794 (1972); Commonwealth v. Matthews, 446 Pa. 65, 285 A.2d 510 (1971); Commonwealth v. Lewis, 443 Pa. 305, 279 A.2d 26 (1971).

ity[416] or admission against penal interest.[417] The *reliability of the information* can be shown by the specificity of the informant's information,[418] surveillance,[419] reputation or past activities of the perpetrator,[420] or official records.[421] And, of course, credibility of the informant and reliability of the information can be shown by a combination of facts relating to the informant or corroboration of his information.[422]

(3) *Timing of Search*

A search incident to an arrest must be contemporaneous with that arrest.[423] Thus, when a defendant is arrested, a search of his person or the immediate vicinity must take place immediately.[424] Similarly, if an unlawful act occurs but the accused is not arrested until days or weeks later, a search between the act and the arrest is not incident to the arrest and is unlawful.[425]

Police may, however, as part of their "booking or slating," make the initial search or even a more complete search of the defendant or his effects when he is taken into police headquarters.[426] Similarly, if there is a question of the health of the defendant, police may wait until the defendant receives medical attention and search him or his effects at a hospital.[427] But there must be altruistic motives[428] and a true arrest.[429]

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416. McCray v. Illinois, 386 U.S. 300 (1967); Commonwealth v. Dial, 445 Pa. 251, 285 A.2d 125 (1971).

417. Commonwealth v. White, 447 Pa. 331, 290 A.2d 246 (1972).

418. Commonwealth v. Devlin, 221 Pa. Super. 175, 289 A.2d 237 (1972). *See* Adams v. Williams, 407 U.S. 143 (1972).

419. United States v. Singleton, 439 F.2d 381 (3d Cir. 1971); Commonwealth v. Williams, 219 Pa. Super. 109, 280 A.2d 430 (1971).

420. *See* United States v. Harris, 403 U.S. 573 (1971).

421. Commonwealth v. Frisby, 451 Pa. 16, 301 A.2d 610 (1973) (handwriting comparison).

422. Commonwealth v. Smith, 452 Pa. 1, 304 A.2d 456 (1973); Commonwealth v. Mitchell, 222 Pa. Super. 335, 295 A.2d 90 (1972). *See* Adams v. Williams, 407 U.S. 143 (1972).

423. Coolidge v. New Hampshire, 403 U.S. 443 (1971); Stoner v. California, 376 U.S. 483 (1963); Commonwealth v. Ellsworth, 421 Pa. 169, 218 A.2d 249 (1964); Commonwealth v. Robinson, 218 Pa. Super. 49, 269 A.2d 332 (1970).

424. *See* Coolidge v. New Hampshire, 403 U.S. 443 (1971); Stoner v. California, 376 U.S. 483 (1964); Commonwealth v. Linde, 448 Pa. 230, 293 A.2d 62 (1972).

425. Commonwealth v. Murray, 441 Pa. 22, 271 A.2d 500 (1970); Commonwealth v. Wolpert, 224 Pa. Super. 361, 308 A.2d 120 (1973).

426. Chambers v. Maroney, 399 U.S. 42 (1970); United States v. Frankenberry, 387 F.2d 337 (2d Cir. 1967); Commonwealth v. Querubin, 211 Pa. Super. 360, 236 A.2d 538 (1967).

427. Commonwealth v. Gordon, 431 Pa. 512, 246 A.2d 325 (1968), *cert. denied*, 394 U.S. 937 (1969).

428. *See* Commonwealth v. Wolpert, 224 Pa. Super. 361, 308 A.2d 120 (1973).

429. *See* Brett v. United States, 412 F.2d 401 (5th Cir. 1969); Commonwealth v. Murray, 441 Pa. 22, 271 A.2d 500 (1970).

Of course, when an arrest authorizing an incidental search occurs is a legal question and must be determined by the courts from the facts and circumstances.[430]

(4) *Scope of the Search*

The permissible scope of a search incident to an arrest depends upon the nature of the offense, the nature of the arrest, and the circumstances of the arrest.

Where an arrest is made for minor offenses which do not involve unlawful possession of contraband or violent or dangerous conduct, a full search may not be made. Rather, the only search that can be made is a protective search for weapons (stop and frisk) to protect the safety of the officers.[431] Similarly, a non-custodial stop for a traffic violation does not even justify a pat-down, let alone a full search, unless reasonable suspicions are aroused, justifying a frisk, or probable cause is evident, justifying an arrest for a more serious offense and an incidental search.[432]

Where there is probable cause for an arrest, but no formal arrest, a full search may also not be justified. The scope of the search depends on the likelihood that the individual arrested would destroy evidence or endanger the police.[433]

Ordinarily, however, an arrest will justify an incidental search of the defendant and the area into which he might reasonably reach to obtain a weapon or destroy evidence.[434] If a woman is involved in an arrest, her person includes her pocketbook and it may be searched.[435]

Not everyone at the scene of an arrest (or search) may be searched.[436] However, if the police reasonably believe that a defendant or his companions are armed or dangerous, they may frisk

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430. Cupp v. Murphy, 412 U.S. 291 (1973).
431. Commonwealth v. Freeman, 222 Pa. Super. 179, 293 A.2d 84 (1972).
432. Commonwealth v. Pollard, 450 Pa. 133, 299 A.2d 207 (1973). *See* Commonwealth v. Swanger, 453 Pa. 107, 307 A.2d 875 (1973).
433. Cupp v. Murphy, 412 U.S. 291 (1973).
434. Williams v. United States, 401 U.S. 646 (1971); Chimel v. California, 395 U.S. 752 (1969); Commonwealth v. Spriggs, 224 Pa. Super. 76, 302 A.2d 442 (1973). *See* Commonwealth v. Ceravolo, 224 Pa. Super. 464, 307 A.2d 288 (1973).
435. Commonwealth v. Hughes, 219 Pa. Super. 181, 280 A.2d 556 (1971). *See* Commonwealth v. Watkins, 222 Pa. Super. 146, 292 A.2d 505 (1972).
436. Commonwealth v. Reece, 437 Pa. 422, 263 A.2d 463 (1970); Commonwealth v. Bourke, 218 Pa. Super. 320, 280 A.2d 425 (1971).

both the defendant and the companions to assure their own safety.[437]

Of course, if police are lawfully making an arrest, they may seize evidence, contraband or weapons that come into plain view.[438]

E. *Stops and Frisks*

As indicated above, with certain minor offenses or traffic violations, police have a right to make a protective "pat-down" of individuals.[439] Similarly, police have a right to frisk bystanders during an arrest or search.[440]

Independent of these rules, where police have a reasonable suspicion that (1) *criminal activity is afoot* and (2) that the suspect is *armed and dangerous*, they may temporarily stop that suspect and *pat him down for weapons*, in order to insure their safety and the safety of third persons.[441]

Reasonable suspicion of criminal activity is less than probable cause.[442] Nevertheless, it is more than a "sixth sense" instinct. The specific facts must show that there is a basis for a belief that criminal activity is afoot and that the individuals frisked are tied to that activity.[443] Thus, an offense followed by a general description of the perpetrators might not justify a frisk; an offense followed by a more specific description will.[444]

Reasonable suspicion of criminal activity will *only* justify a pat-down if accompanied by a belief that the suspect is armed or dangerous.[445] Thus, suspicion of a burglary might not justify a frisk.[446] Suspicion of possession of a weapon will.[447] Suspicion of robbery, not mere burglary, must be assumed, then, to indicate that individuals allegedly involved were dangerous.[448]

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437. Commonwealth v. Reece, 437 Pa. 422, 263 A.2d 463 (1970); *See* Commonwealth v. Watkins, 222 Pa. Super. 146, 292 A.2d 505 (1972).

438. *See, e.g.*, Commonwealth v. Davenport, 453 Pa. 235, 308 A.2d 85 (1973); Commonwealth v. Smith, 443 Pa. 151, 277 A.2d 807 (1971); Commonwealth v. Watkins, 222 Pa. Super. 146, 292 A.2d 505 (1972).

439. *See* notes 431-32 and accompanying text *supra.*

440. *See* notes 436-37 and accompanying text *supra.*

441. Terry v. Ohio, 392 U.S. 1 (1968).

442. Commonwealth v. Watkins, 222 Pa. Super. 146, 292 A.2d 505 (1972); Commonwealth v. Clarke, 219 Pa. Super. 340, 280 A.2d 662 (1971).

443. *See* Adams v. Williams, 407 U.S. 143 (1972); *In re* Harvey, 222 Pa. Super. 222, 295 A.2d 93 (1972); Commonwealth v. Meadows, 222 Pa. Super. 202, 293 A.2d 365 (1972).

444. *Compare* Commonwealth v. Berrios, 437 Pa. 338, 263 A.2d 342 (1970), *with* Commonwealth v. Sharpe, 449 Pa. 35, 296 A.2d 519 (1972), *and* Commonwealth v. Gilmore, 447 Pa. 21, 288 A.2d 757 (1972).

445. Commonwealth v. Pegram, 450 Pa. 590, 301 A.2d 695 (1973); *In re* Harvey, 222 Pa. Super. 222, 295 A.2d 93 (1972); Commonwealth v. Meadows, 222 Pa. Super. 202, 293 A.2d 365 (1972).

446. Commonwealth v. Meadows, 222 Pa. Super. 202, 293 A.2d 365 (1972).

447. Adams v. Williams, 407 U.S. 143 (1972); Commonwealth v. Watkins, 222 Pa. Super. 146, 292 A.2d 505 (1972).

448. United States *ex rel.* Richardson v. Rundle, 461 F.2d 860 (1972).

If as as result of a proper frisk, weapons are felt, the defendant may be searched, arrested and the evidence seized.[449] A more extensive search is then justified as incident to the arrest.[450]

Whether a case, other than a minor or traffic violation, falls into the "stop and frisk" or "incident to the arrest" exception depends on the facts of the case. Thus, some descriptions of perpetrators might equal "reasonable suspicion" and others "probable cause."[451] The difference is important. Probable cause to arrest ordinarily justifies a complete search of the person, whether or not he is believed to be armed.[452] Reasonable suspicion of criminal activity justifies a limited pat-down only if there is also a belief that the suspect is armed or dangerous.[453]

F. *Stops and Searches of Automobiles*

The validity and scope of an automobile search depends on the basis for a search. As in any other situation, a search warrant should be obtained. However, given a valid exception, and considering the problem of a mobile vehicle, automobiles may be searched without a warrant.

(1) *Traffic Stop*

In Pennsylvania at least, although "routine" traffic stops for checking of license and registration are authorized by statute,[454] evidence viewed, obtained or seized as a result of such stops is inadmissible.[455] There must be specific facts justifying an intrusion into the right of privacy. Such stops will only authorize the use of evidence derived from them if the police officer has probable cause, based on specific facts, which indicate to him that either the vehicle or the driver are in violation of the motor vehicle code.[456] Where there is information furnishing a reasonable basis

449. Terry v. Ohio, 392 U.S. 1 (1968); United States *ex rel.* Richardson v. Rundle, 461 F.2d 860 (3d Cir. 1972).

450. Adams v. Williams, 407 U.S. 143 (1972); Terry v. Ohio, 392 U.S. 1 (1968); Commonwealth v. Spriggs, 224 Pa. Super. 76, 302 A.2d 442 (1973). *See* Commonwealth v. Hicks, 434 Pa. 153, 253 A.2d 76 (1969).

451. *Compare* Commonwealth v. Gilmore, 447 Pa. 21, 288 A.2d 757 (1972), *with* Commonwealth v. Sharpe, 449 Pa. 35, 296 A.2d 519 (1972).

452. *See* notes 434-35 and accompanying text *supra.*

453. Commonwealth v. Vassiljev, 218 Pa. Super. 215, 275 A.2d 852 (1971).

454. PA. STAT. ANN., tit. 75, § 1221(d) (1970).

455. Commonwealth v. Swanger, 453 Pa. 107, 307 A.2d 875 (1973). *But see* State v. Severance, 108 N.H. 404, 237 A.2d 683 (1968); State v. Boone, 114 N.J. Super. 521, 277 A.2d 414 (1971).

456. Commonwealth v. Swanger, 453 Pa. 107, 307 A.2d 875 (1973); Commonwealth v. DeJesus, 226 Pa. Super. 29, 310 A.2d 323 (1973).

for a belief that a violation has occurred, there may be a stop.[457] If such a stop is validly made, anything in plain view which is evidence of a crime, a weapon, or contraband, may be seized. Since plain view does not hibernate at night, police may use their flashlight to view those in the car and the car itself.[458]

The United States Supreme Court has recently held[459] that an arrest for a motor vehicle violation or offense, that involves taking an individual into custody, however limited, allows a complete search of the violator and seizure of any evidence of a crime, weapons, or contraband.

However, Pennsylvania cases have held that, even after a motor vehicle violation stop, unless specific facts and circumstances indicate that the driver or passengers are armed and dangerous, there is no basis to require the passenger to leave the car and to frisk them, let alone make a full search.[460] Of course, specific facts indicating possession of a weapon would justify such a pat-down.[461]

A traffic stop alone will not justify the seizure of a car or a search of it unless the police have reason to believe that a felony has been committed by the occupant of the car; that the car is being used in the furtherance of a felony; that evidence of a crime is in the car; or that weapons are in the car and easily accessible to the occupant.[462]

(2) *Arrests in Automobiles*

When police, with probable cause, effectuate the arrest of a defendant in a car, they may make a limited search without a warrant of the car incident to the defendant's arrest.[463] This search, as with all searches incident to an arrest, extends only to the areas within the immediate access of the defendant.[464] However, where specific facts indicate the presence of evidence, contraband or weapons in the trunk or hidden in the car, a more thorough search of the car, including the trunk, may be made.[465]

If, after arrest of a defendant, his car is taken into custody

457. Commonwealth v. DeJesus, 226 Pa. Super. 29, 310 A.2d 323 (1973).
458. *Id.*
459. United States v. Robinson, U.S. , 94 S. Ct. 466 (1973); Gustafson v. Florida, U.S. , 94 S. Ct. 488 (1973); Commonwealth v. DeJesus, 226 Pa. Super. 29, 310 A.2d 323 (1973). Whether the arrest is "custodial" or not would appear to depend solely on whether or not the police officer decides to remove the violator from the scene.
460. Commonwealth v. Pollard, 450 Pa. 133, 299 A.2d 207 (1973).
461. *See* Adams v. Williams, 407 U.S. 143 (1972).
462. Commonwealth v. Lewis, 442 Pa. 98, 275 A.2d 51 (1971); Commonwealth v. Dussell, 439 Pa. 392, 266 A.2d 659 (1970).
463. Preston v. United States, 376 U.S. 364 (1964); United States v. Menke, 468 F.2d 20 (3d Cir. 1972); Commonwealth v. Smith, 452 Pa. 1, 304 A.2d 456 (1973).
464. *See* Commonwealth v. Smith, 452 Pa. 1, 304 A.2d 456 (1973).
465. *See* Cady v. Dombrowski, 413 U.S. 433 (1973); Commonwealth v. DeFleminque, 450 Pa. 163, 299 A.2d 246 (1973).

or control by the police, the car may be searched then. If a search of the vehicle incident to an arrest could lawfully be conducted on the highway, but would be dangerous or difficult if so conducted, the vehicle may be moved and searched at the police station instead.[466] Of course, such a warrantless search is only authorized if made after arrest of a defendant, in or near his car.[467]

(3) *Mobility Doctrine*

Because cars are mobile, the opportunity for a search is fleeting.[468] Thus if there is independent probable cause to believe that an automobile contains contraband, stolen goods, or is an instrumentality of a crime, the car may be searched without a warrant, and either the car itself or evidence in it may be seized.[469]

However, where it is clear that this mobility is not present and that there is no possibility that a defendant, or others, would have access to the vehicle, there is no danger that the evidence might be destroyed or lost and a search warrant is required to search the car, absent any other justification such a search incident to an arrest.[470]

Of course, the "mobility doctrine" eliminates only the need for a warrant; it does not eliminate the need for probable cause.[471] If there is an independent statutory right to stop, search or seize a vehicle, such as a border search or inventory of an impounded car, the seizure of evidence in the car is lawful.[472]

G. *Search by Private Citizens*

Neither the Fourth Amendment of the United States Constitution, nor Article 1, Section 8 of the Pennsylvania Constitution prescribe exclusion of evidence because of unreasonable searches and seizures by private persons. Unless the person searching and

466. Chambers v. Maroney, 399 U.S. 42 (1970); Commonwealth v. Smith, 452 Pa. 1, 304 A.2d 456 (1973).

467. *See* Commonwealth v. Heard, 451 Pa. 125, 301 A.2d 870 (1973); Commonwealth v. Linde, 448 Pa. 230, 293 A.2d 62 (1972).

468. Carroll v. United States, 267 U.S. 132 (1925); United States *ex rel.* McNeil v. Rundle, 325 F. Supp. 672 (E.D. Pa. 1971).

469. Brinegar v. United States, 338 U.S. 160 (1949); Carroll v. United States, 267 U.S. 132 (1925).

470. Coolidge v. New Hampshire, 403 U.S. 443 (1971); Commonwealth v. Linde, 448 Pa. 230, 293 A.2d 62 (1972); Commonwealth v. Ceravolo, 224 Pa. Super. 464, 307 A.2d 288 (1973).

471. *See* Cady v. Dombrowski, 413 U.S. 433 (1973); Almeida-Sanchez v. United States, 413 U.S. 266 (1973).

472. Coolidge v. New Hampshire, 403 U.S. 443 (1971); United States v. West, 453 F.2d 1351 (3d Cir. 1972).

seizing is, in fact, a conduit of the police, there is no public invasion of privacy and thus the exclusionary rules do not apply.[473]

Of course, while warrantless searches may be undertaken by citizens, a search warrant must be secured and executed by law enforcement officers.[474]

PART III—IDENTIFICATIONS

XI. INTRODUCTION

Prior to 1967, the issue of identification or misidentification was one of fact, to be determined by the trier of fact at trial.[475] There was no requirement that counsel be present at any out of court identification, nor that a separate hearing be held to determine the fairness of the identification.[476] The conduct of the out-of-court identification, the nature of the identification, and the ability of the witness to make an identification were all questions of weight and not admissibility.[477]

In *United States v. Wade*,[478] the United States Supreme Court held that an accused is entitled to counsel at a formal lineup identification conducted after indictment. In addition, the Court held in *Wade* and companion cases[479] that no identification obtained by a procedure which is "impermissibly suggestive," may be admitted.[480] Finally, the Court held that any out-of-court identification, made without the presence of counsel, or a knowing and effective waiver of the right, or made in an impermissibly suggestive atmosphere would be excluded at trial. If such out-of-court identification were excluded, an in-court identification would also be inadmissible unless it could be shown that it is based on a source independent of the out-of-court identification and therefore not tainted by it.[481]

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473. PA. R. CRIM. P. 2004.

474. *Id.*

475. *See, e.g.*, Commonwealth v. Kloiber, 378 Pa. 412, 106 A.2d 820 (1954); Commonwealth v. Sharpe, 138 Pa. Super. 156, 10 A.2d 120 (1939); Commonwealth v. Ricci, 161 Pa. Super. 193, 54 A.2d 51 (1947). *See* Simmons v. United States, 390 U.S. 377, 382 (1968); United States *ex rel.* Choice v. Brierley, 460 F.2d 68, 72-73 (3d Cir. 1972).

476. *See* Williams v. United States, 345 F.2d 733 (D.C. Cir.), *cert. denied*, 382 U.S. 962, 86 S. Ct. 444 (1965).

477. Commonwealth v. Kloiber, 378 Pa. 412, 423-26, 106 A.2d 820, 826-27 (1954); Commonwealth v. Sharpe, 138 Pa. Super. 156, 158, 10 A.2d 120, 121 (1939). They are still questions for the jury, even after an identification has been ruled admissible. *See* Commonwealth v. Hickman, 453 Pa. 427, 309 A.2d 564 (1973); Commonwealth v. White, 447 Pa. 331, 290 A.2d 246 (1972).

478. United States v. Wade, 388 U.S. 218 (1967).

479. Gilbert v. California, 388 U.S. 263 (1967); Stovall v. Denno, 388 U.S. 293 (1967).

480. Stovall v. Denno, 388 U.S. 293, 301-02 (1967).

481. United States v. Wade, 388 U.S. 218, 241 (1967); *see* Commonwealth v. Spencer, 442 Pa. 328, 332, 275 A.2d 299, 301 (1971).

In order to effectuate this exclusionary rule, a defendant would be entitled to a pre-trial evidentiary hearing, similar to that held to determine the admissibility of evidence derived from a search and seizure or interrogation.[482] At that hearing, the court has to determine whether defendant was entitled to counsel and, if so, whether that right was effectuated, either by waiver or by an attorney's presence. In addition, the judge must determine whether the identification procedure was impermissibly suggestive. Both tests must be satisfied before an out-of-court identification is admissible.[483] Finally, the hearing judge must determine the admissibility of the in-court identification. The admission of the in-court identification without first determining that it was not tainted by the illegal out-of-court identification is constitutional error.[484]

The right to have counsel present at an identification procedure is not retroactive. The right to a fair identification procedure is. For any identification requiring counsel conducted after June 12, 1967, the prosecution cannot introduce any evidence of a witness's identification unless it can show either that the defendant was informed of his sixth amendment right to have counsel present and waived that right, or that counsel was present. For any identification before or after June 12, 1967, the prosecution cannot introduce any evidence of a witness's identification when that identification was based on an impermissibly or unnecessarily suggestive procedure.[485]

XII. LINEUPS

A. *Right to a Lineup or Not to Participate*

Lineups are preferred to other identification techniques but they are not required.[486] An identification conducted between a witness and the accused, singly and not part of a lineup, is of doubtful validity.[487] However, there are exceptions, such as acci-

482. *See* PA. R. CRIM. P. 323; Commonwealth v. McMillion, 215 Pa. Super. 306, 265 A.2d 375 (1969).

483. *See* Kirby v. Illinois, 406 U.S. 682 (1972) and United States v. Wade, 388 U.S. 218 (1967).

484. Gilbert v. California, 388 U.S. 263 (1967).

485. Stovall v. Denno, 388 U.S. 293 (1967).

486. *See, e.g.*, Neil v. Biggers, 409 U.S. 188, 199 (1972); Simmons v. United States, 390 U.S. 377 (1968); Stovall v. Denno, 388 U.S. 293 (1967); United States v. Hunt, 476 F.2d 1127 (D.C. Cir. 1973); Commonwealth v. Jennings, 446 Pa. 294, 285 A.2d 143 (1971); *cf.* Commonwealth v. Mackey, 447 Pa. 32, 288 A.2d 778 (1972).

487. Stovall v. Denno, 388 U.S. 293, 302 (1967); United States v. Wade, 388 U.S. 218, 234 (1967); Clemons v. United States, 408 F.2d 1230, 1237

dental,[488] on-the-scene,[489] or emergency situations[490] which justify a one-on-one identification procedure. And certainly, a photographic identification[491] or an in-court identification at trial[492] is valid without any prior lineup.

A defendant has no right to refuse to participate in a lineup, to speak words, or to wear certain clothing.[493] Refusal to participate can result in the defendant being held in criminal contempt,[494] and can be introduced as evidence and commented upon at trial.[495] While there must be reasonable cause to put one in a lineup who is not in custody,[496] there is no constitutional requirement for such cause to place one already legally in custody on other charges in to a lineup.[497] Of course, singling out one participant in a lineup for certain actions, words or clothing may be sufficient to show that the identification procedure was impermissibly suggestive and thus render the identification inadmissible.[498]

B. *Right to Counsel*

United States v. Wade held that a defendant is entitled to counsel at any critical stage of a criminal case and that a lineup identification is such a critical stage.[499] The decision suggested to some that this right to counsel attached at any lineup.[500] It sug-

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(D.C. Cir. 1968). *See* Commonwealth v. Whiting, 439 Pa. 205, 266 A.2d 738 (1970); Commonwealth v. Hall, 217 Pa. Super. 218, 269 A.2d 352 (1970).

488. *See, e.g.*, United States v. Furtney, 454 F.2d 1 (3d Cir. 1972); Commonwealth v. Jones, 220 Pa. Super. 214, 283 A.2d 707 (1971).

489. United States v. Savage, 470 F.2d 948 (3d Cir. 1972); United States v. Gaines, 450 F.2d 186 (3d Cir. 1971); Russell v. United States, 408 F.2d 1280 (D.C. Cir. 1969); Commonwealth v. Jones, 220 Pa. Super. 214, 283 A.2d 707 (1971); *see also* Commonwealth v. Hall, 217 Pa. Super. 218, 269 A.2d 352 (1970).

490. *Compare* Stovall v. Denno, 388 U.S. 293 (1967) *with* Commonwealth v. Hall, 217 Pa. Super. 218, 269 A.2d 352 (1970). *See also* McRae v. United States, 420 F.2d 1283 (D.C. Cir. 1969) (no showing of *in extremis* situation).

491. Simmons v. United States, 390 U.S. 377 (1968).

492. United States v. Dorantes, 472 F.2d 298 (3d Cir. 1972); United States v. Hill, 449 F.2d 743 (3d Cir. 1971); Commonwealth v. Jennings, 446 Pa. 294, 285 A.2d 143 (1971).

493. Gilbert v. California, 388 U.S. 263, 266-67 (1967); United States v. Wade, 388 U.S. 218 (1967); United States v. Gaines, 450 F.2d 186 (3d Cir. 1971).

494. United States v. Hammond, 419 F.2d 166 (4th Cir. 1969).

495. United States v. Parhms, 424 F.2d 152 (9th Cir. 1970); Higgins v. Wainwright, 424 F.2d 177 (5th Cir. 1970); State v. Ginardi, 111 N.J. Super. 435, 268 A.2d 534 (1970).

496. Biehunik v. Felicetta, 441 F.2d 228 (2d Cir. 1971); Wise v. Murphy, 275 A.2d 203 (D.C. Ct. App. 1971). *See* Butcher v. Rizzo, 317 F. Supp. 899 (E.D. Pa. 1970).

497. United States v. Jones, 403 F.2d 498 (7th Cir. 1968); Rigney v. Hendrick, 355 F.2d 710 (3d Cir. 1965), *cert. denied*, 384 U.S. 975 (1966).

498. Foster v. California, 394 U.S. 440 (1969). *See* Butcher v. Rizzo, 317 F. Supp. 899 (E.D. Pa. 1970).

499. United States v. Wade, 388 U.S. 218 (1967).

500. *Id.* at 231-32.

gested to others that it applied in its limited fact situation—only to post-indictment lineups.[501] The Pennsylvania courts applied the right to counsel rule to all cases, whether before or after formal arrest, information or indictment.[502]

On June 7, 1972, the United States Supreme Court resolved this problem for federal constitutional purposes. In *Kirby v. Illinois*,[503] the Court held that the right to counsel attaches "at . . . the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information or arraignment. . . ."[504] Of course, the due process standard, forbidding any lineup that is "unnecessarily suggestive," is still maintained.[505]

Most courts have adopted the *Kirby* application of *Wade*, holding that there is no right to counsel until the prosecution has been formally initiated.[506] Pennsylvania courts, however, have not reconsidered their earlier position applying the right to counsel to *all* lineups.[507]

> It is central to (the constitutional) principle that in addition to counsel's presence at trial, the accused is guaranteed that he need not stand alone against the state *at any stage of the prosecution, formal or informal, in court or out*, where counsel's absence might derogate from the accused's right to a fair trial. . . . In short, the accused's inability to reconstruct at trial any unfairness that occurred at the lineup may deprive him of his only opportunity meaningfully to attack the credibility of the witness's courtroom identification (emphasis added).

See id. at 254 (dissenting opinion of Justice White, concurred in by Justices Harlan and Stewart): "The [right to counsel] rule applies to any lineup . . . regardless of when the identification occurs, in time or place, and whether before or after indictment or information." *See, e.g.*, Long v. United States, 424 F.2d 799 (D.C. Cir. 1969); United States v. Foster, 337 F. Supp. 696 (E.D. Pa. 1972); Palmer v. State, 5 Md. App. 691, 249 A.2d 482 (1969); People v. Banks, 2 Cal. 3d 127, 465 P.2d 263 (1970).

501. *See* United States v. Wade, 388 U.S. 218, 236-37 (1967): "[T]here can be little doubt that for *Wade the post-indictment lineup was a critical stage* of the prosecution at which he was 'as much entitled to such aid (of counsel) . . . as at the trial itself.'" *See also* Simmons v. United States, 390 U.S. 377, 382-83 (1968); United States v. D'Argento, 373 F.2d 307 (7th Cir. 1967); People v. Palmer, 41 Ill. 2d 571, 244 N.E.2d 173 (1969); State v. Wilkerson, 60 N.J. 452, 291 A.2d 8 (1972).

502. *See, e.g.*, Commonwealth v. Spencer, 442 Pa. 328, 275 A.2d 299 (1971); Commonwealth v. Thomas, 444 Pa. 436, 282 A.2d 693 (1971); Commonwealth v. Whiting, 439 Pa. 205, 266 A.2d 738 (1970); Commonwealth v. Lee, 215 Pa. Super. 240, 257 A.2d 326 (1969).

503. Kirby v. Illinois, 406 U.S. 682 (1972).

504. *Id.* at 689.

505. *Id.* at 691.

506. *See, e.g.*, Smith v. Coiner, 473 F.2d 877 (9th Cir. 1973); United States v. Gomes, 464 F.2d 686 (3d Cir. 1972); State v. Earle, 60 N.J. 550, 292 A.2d 2 (1972).

507. *See* Commonwealth v. Smith, 452 Pa. 1, 304 A.2d 456 (1973)

Wade[508] itself indicates that the right to counsel at a lineup, like the right to counsel during interrogations,[509] can be waived but the waiver must be knowing, intelligent, and voluntary.[510] However, the giving of the so-called *Miranda* warnings is insufficient. A defendant must be specifically informed not only of his right to counsel, free if the defendant is indigent, but also of the right to have his counsel present at the lineup.[511]

Wade also indicates that "substitute counsel" may be used where notification and presence of the suspect's own counsel might result in undue delay.[512] Thus, a public defender[513] or an independent attorney, not retained or appointed for the suspect,[514] may be utilized.

At the lineup, counsel's role is limited.[515] Unlike an interroga-

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(holding *Whiting* rule applicable but not retroactive); Commonwealth v. Minifield, 225 Pa. Super. 149, 151 n.4, 310 A.2d 366, 367 n.4 (1973).

508. United States v. Wade, 388 U.S. 218, 237 (1967).

509. *See* Miranda v. Arizona, 384 U.S. 436, 444 (1966).

510. *See* Johnson v. Zerbst, 304 U.S. 458 (1938).

511. United States v. Ayers, 426 F.2d 524 (2d Cir.), *cert. denied*, 400 U.S. 842 (1970).

512. United States v. Wade, 388 U.S. 218, 237 (1967). In a footnote, the Court explained:

> Although the right to counsel usually means a right to the suspect's own counsel, provision for substitute counsel may be justified on the ground that the substitute counsel's presence may eliminate the hazards which render the lineup a critical stage for the presence of the suspect's *own* counsel.

Id. at 237 n.27.

513. United States v. Queen, 435 F.2d 66 (D.C. Cir. 1970).

514. Wilson v. Gaffney, 454 F.2d 142 (10th Cir. 1970); *see* Zamora v. Guam, 394 F.2d 815, 816 (9th Cir. 1968). In fact, one court has permitted the use of an Assistant District Attorney. *See* State v. LaCoste, 256 La. 691, 237 So. 2d 871 (1970).

515. In Philadelphia, most defendants at lineups are represented by the Defender Association of Philadelphia. As a result of a dispute with the Police Department, the Defender Association refused at one time to participate in lineups. The District Attorney petitioned the court of common pleas for an Order directing the Defender Association to furnish counsel for indigents, in accordance with their contractual obligation with the City of Philadelphia. In an Order, dated March 10, 1970, D. Donald Jamieson, President Judge of the Philadelphia Court of Common Pleas, so ordered. In the accompanying Opinion, *In re: Defender Association of Philadelphia,* Judge Jamieson defined the rights of defense counsel:

> 1. As an observer, he may more objectively than the suspect detect the presence of suggestive influences,
> 2. [W]ithout unduly interfering with the lineup designed to remove improper suggestion.
> 3. [C]ounsel is entitled to knowledge of the information possessed by the identifying witnesses upon which they propose to act in making an identification. Counsel, therefore, should be given an opportunity to interview a witness before a lineup. . . .
> 4. [Allowable] questioning by counsel could be reduced to an absolute minimum if [police] would require that witnesses, before a lineup, give a description, reduced to writing, signed by the witness and that a copy thereof be made available to counsel.
> 5. [S]uch description would indicate . . . the physical characteristics and clothing worn by the perpetrator . . . , the circum-

tion, where he can advise his client to exercise his right to remain silent,[516] he may not advise his client that he has a right not to be in a lineup.[517] He is there only as an observer, to witness the fairness or unfairness of the proceedings.[518] He is there to assure that there have been neither unfair promptings of the witness nor unfair or suggestive arrangements of the participants in the lineup.[519] At least one court has suggested that supplying counsel with prior descriptions given by the witness would limit the questions he could ask the witness to inquiries about whether he has been told that the perpetrator is in the lineup.[520] But there is no right to the names and addresses of the witnesses,[521] and, in fact, the witness's identity may be concealed.[522] Counsel is free to make recommendations but may not force the police to accept them. Such issues should be preserved and can be raised at a suppression hearing challenging the fairness of the lineup.[523]

C. *Fairness of the Lineup*

Whether or not a defendant is entitled to *counsel* at his lineup,[524] he is always entitle to a *fair* lineup.[525] If the lineup is conducted in a manner that is so unnecessarily or impermissibly suggestive as to be conducive to irreparable mistaken identification, it is invalid.[526] Each lineup must be decided on its own facts

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stances at the time of the crime under which the observation was made. . . .

6. Counsel has no right of unlimited questioning. . . .
. . . .
It would be relevant to ask: Have the police or anyone else advised the witness that the person who committed the crime (as distinguished from a suspect) is in the lineup?

7. [T]here would be no relevance in questions . . . such as . . . Has the witness been shown and identified any photographs of suspects in the lineup? . . . [or] were there previous lineups which the witness attended, and did the witness identify anyone in those lineups?

516. *See* Miranda v. Arizona, 384 U.S. 436 (1966).

517. *See* United States v. Wade, 388 U.S. 218, 222-23 (1967). *See* text accompanying notes 493 and 494 *supra.*

518. United States v. Wade, 388 U.S. 218, 236-37 (1967).

519. *See* United States v. Wade, 388 U.S. 218, 236-37 (1967).

520. Opinion *In re: Defender Association. See* note 515 *supra.*

521. United States v. Ely, 286 A.2d 239 (D.C. Ct. App. 1972).

522. United States v. Wade, 388 U.S. 218, 238 n.28 (1967).

523. *See* Note, 29 U. PITT. L. REV. 65, 75 (1967); Note, 77 YALE L.J. 390, 396-97 (1967).

524. *See* text at notes 499-507 *supra.*

525. Kirby v. Illinois, 406 U.S. 682 (1972); Stovall v. Denno, 388 U.S. 293 (1967).

526. Kirby v. Illinois, 406 U.S. 682 (1972); Simmons v. United States, 390 U.S. 377, 384 (1968); Stovall v. Denno, 388 U.S. 293, 302 (1967). "Unnecessarily suggestive" is the language of *Stovall, id.* at 302, while *Sim-*

and be reviewed from a "totality of the circumstances" to determine its fairness or unfairness.[527]

The initial question is whether the lineup was suggestive.[528] If it was suggestive, can the procedure be justified by necessity?[529] Even if the procedure was unnecessarily suggestive, was it nonetheless sufficiently reliable[530] to indicate that there was not a very substantial likelihood of irreparable mistaken identification.[531]

In order to assure that the lineup is not suggestive, there should be a number of similar people in it large enough to require a real choice by the witness.[532] The police must make sure that the suspect is not singled out by being dressed differently, or by being of a different race or size, or by being forced to say or do something that the others are not.[533] Similarly, the police cannot point out a defendant through the use of repeated lineups or identifications in which he is the only common participant.[534] Differentiating one man would be almost the same as if the police told the witness: "This is the man!"[535] Where multiple witnesses are involved, they should be separated and certainly not allowed to speak to each other until after the identification.[536] Joint identifications are "fraught with the dangers of suggestiveness."[537] And, of course, the

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mons, on photographic identification, quoting *Stovall* uses the phrase "impermissibly suggestive," 390 U.S. at 384. Both have the same meaning. *See* United States *ex rel.* Phipps v. Follette, 428 F.2d 912, 914-15 (2d Cir. 1970).

527. Coleman v. Alabama, 399 U.S. 1 (1970); Stovall v. Denno, 388 U.S. 293, 302 (1967); United States v. Conway, 415 F.2d 158, 163 (3d Cir. 1967).

528. *Compare* Foster v. California, 394 U.S. 440 (1969), *with* Coleman v. Alabama, 399 U.S. 1 (1970).

529. *See* Simmons v. United States, 390 U.S. 377, 384-85 (1968); Stovall v. Denno, 388 U.S. 293, 302 (1967).

530. *See* Neil v. Biggers, 409 U.S. 188 (1972).

531. *See* Coleman v. Alabama, 399 U.S. 1, 5 (1970); Simmons v. United States, 390 U.S. 377, 384 (1968); United States *ex rel.* Phipps v. Follette, 428 F.2d 912, 914-15 (2d Cir. 1970); Gregory v. United States, 410 F.2d 1016 (D.C. Cir.), *cert. denied*, 396 U.S. 865 (1969); State v. Carnegie, 158 Conn. 264, 259 A.2d 628, *cert. denied*, 369 U.S. 392 (1969); People v. McMath, 45 Ill. 2d 33, 256 N.E.2d 835 (1970).

532. *See* United States v. Wade, 388 U.S. 218, 236 n.26 (1967); Commonwealth v. Wilson, 450 Pa. 296, 301 A.2d 823 (1973); Henry v. State, 46 Ala. App. 175, 239 So. 2d 318 (1970).

533. *See* United States v. Wade, 388 U.S. 218, 236 n.26 (1967); United States v. Collins, 416 F.2d 696 (4th Cir. 1969); United States v. Lewis, 472 F.2d 252 (3d Cir. 1973). People v. Taylor, 24 Mich. App. 321, 180 N.W.2d 195 (1970); People v. Tenizah, 238 N.E.2d 626 (Ill. App. 1968); State v. Northrup, 303 A.2d 1 (Me. 1973); Opinion of Judge Jamieson, *supra* note 515, at 12 n.5.

534. *See* Foster v. California, 394 U.S. 440 (1909).

535. *Id.* at 443.

536. *See* Montiero v. Pichard, 443 F.2d 311 (1st Cir. 1971); United States v. Wilson, 435 F.2d 403 (D.C. Cir. 1970); Tate v. United States, 268 A.2d 855 (D.C. App. 1970); People v. Noble, 177 N.W.2d 709 (Mich. App. 1970).

537. United States v. Wade, 388 U.S. 218, 234 (1967); Gilbert v. California, 388 U.S. 263, 269-70 (1967); United States *ex rel.* Choice v. Brierley, 363 F. Supp. 178, 188 (E.D. Pa. 1973).

police cannot indicate in any way that they have the actual perpetrator in the lineup or that one participant is the prime suspect.[538]

To protect the record of such identifications, the police should accurately note the identity of the participants, take a picture if possible, and detail what special procedures were undertaken and what responses were made by the witnesses.[539]

Even a suggestive lineup may not be impermissible. If the exigencies of a situation require a one-to-one confrontation, an identification so made might be admissible.[540] Similarly, impossibility of getting a sufficient number of matching participants might indicate necessity.[541] And of course, if a suspect in a lineup engages in conduct that attracts attention to himself, such conduct is not impermissibly suggestive state action.[542]

An identification derived from an impermissibly suggestive lineup will ordinarily be excluded as evidence. However, external factors indicating reliability may be sufficient to outweigh suggestiveness and thus allow its admission.[543] These factors include the opportunity of the witness to view the crime at the time of the crime; the witness' degree of attention; the accuracy of prior descriptions; the level of certainty at the confrontation; and the length of time between the crime and the lineup.[544]

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538. Foster v. California, 394 U.S. 440, 443 (1969); United States *ex rel.* Barnwell v. Rundle, 337 F. Supp. 688 (E.D. Pa. 1973); Commonwealth v. Wilson, 450 Pa. 296, 301 A.2d 823 (1973); *cf.* United States v. Higgins, 458 F.2d 461 (3d Cir. 1972) (indication *after* identification).

539. State v. Earle, 60 N.J. 550, 292 A.2d 2 (1972). A useful comparison of police practices can be made by reference to Directive 58 "Confrontations and Standups" of the Philadelphia Police Department April 30, 1970. In it, the police recommend that there be a "sufficient number of persons" in the lineup and the recommended minimum is six; that the names and positions of the participants be recorded; that they be similar in height, weight, coloration of hair and skin and body type. The directive continues that there be similarity in dress and that if one member is to wear a demonstrable piece of clothing or to speak, all do so. Identifications must be separate and no witnesses may speak to another until all complete their identification. Finally, it must be assured that *"no one* indicates to a witness in any manner which person is the suspect" or that "there is a suspect."

540. *See* Stovall v. Denno, 388 U.S. 291 (1967). *See* text at notes 574-599 *infra.*

541. *See* Neil v. Biggers, 409 U.S. 188 (1972); State v. Mallette, 267 A.2d 438 (1970); People v. Hughes, 24 Mich. App. 223, 180 N.W.2d 66 (1970).

542. State v. Holsey, 204 Kan. 407, 464 P.2d 12 (1970); People v. Nelson, 40 Ill. 2d 140, 238 N.E.2d 378 (1968).

543. *See* Neil v. Biggers, 409 U.S. 188 (1972); Gregory v. United States, 410 F.2d 1016 (D.C. Cir.), *cert denied*, 396 U.S. 865 (1969); United States *ex rel.* Rutherford v. Deegan, 406 F.2d 217 (2d Cir. 1969); *See also* Stanley v. Cox, 486 F.2d 48 (4th Cir. 1973); United States *ex rel.* Choice v. Brierley, 363 F. Supp. 178, 190 (E.D. Pa. 1973).

544. Neil v. Biggers, 409 U.S. 188 (1972). These factors are identical

XIII. Photographic Identifications

In 1968, the United States Supreme Court upheld the right of the police to show photographs to witnesses or victims in order to secure an identification.[545] Like any other identification, each case must be determined on its facts and the standard of exclusion would be whether the photographic identification was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.[546] An evaluation must be made of all the photographs involved to see if the procedure was "impermissibly suggestive" and if so, whether the picture spread is likely to give rise to "irreparable misidentification."[547]

A. *Right to Counsel*

Until 1973, there was a conflict among courts as to whether a defendant had the right to have counsel present at a photographic identification. While most courts held there was no such right,[548] some held that it was required by *Wade*.[549] In Pennsylvania, the courts were bound by the Federal Third Circuit rule[550] of 1970, which was adopted by the Pennsylvania Supreme Court the same year,[551] that counsel was required. The Third Circuit overruled itself in 1972 and held that a pre-trial photographic identification by witnesses was not a critical stage requiring the presence of counsel.[552] Then on June 21, 1973, the United States Supreme Court similarly held that the Sixth Amendment of the United States Constitution did not require counsel at pre-trial photographic identification.[553] However, the Pennsylvania Supreme Court has not yet eliminated the counsel requirement in Pennsylvania.[554]

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with those considered in determining whether an in-court identification is tainted by an excluded out-of-court one. *See* United States v. Wade, 388 U.S. 218, 240 (1967); Gilbert v. California, 388 U.S. 263, 272 (1967); *see* text at notes 611-629 *infra*.

545. Simmons v. United States, 390 U.S. 377 (1968).

546. *Id.* at 384. As noted earlier, *supra* note 526, "impermissibly suggestive" and "unnecessarily suggestive" have the same meaning.

547. United States v. Sutherland, 428 F.2d 1152 (5th Cir. 1970).

548. United States v. Maxwell, 456 F.2d 1053 (10th Cir. 1972); United States v. Serio, 440 F.2d 827 (6th Cir. 1971); United States v. Ballard, 423 F.2d 127 (5th Cir. 1970); United States v. Bennett, 409 F.2d 888 (2d Cir. 1969), *cert. denied*, 396 U.S. 852 (1970); People v. Lawrence, 4 Cal. 3d 273, 93 Cal. Rptr. 204, 481 P.2d 212 (1971); State v. Accor, 277 N.C. 65, 175 S.E.2d 583 (1970).

549. United States v. Zeiler, 427 F.2d 1305 (3d Cir. 1970); Commonwealth v. Whiting, 439 Pa. 205, 266 A.2d 738 (1970).

550. United States v. Higgins, 458 F.2d 461 (3d Cir. 1972); United States v. Holiday, 457 F.2d 912 (3d Cir. 1972); United States v. Zeiler, 427 F.2d 1305 (3d Cir. 1970).

551. Commonwealth v. Whiting, 439 Pa. 205, 266 A.2d 738 (1970).

552. United States v. Coades, 468 F.2d 1061 (3d Cir. 1972); United States v. Dorsey, 462 F.2d 361 (3d Cir. 1972); United States *ex rel.* Reed v. Anderson, 461 F.2d 739 (3d Cir. 1972).

553. United States v. Ash, U.S. , 93 S. Ct. 2568 (1973).

554. *See* Commonwealth v. Claitt, 454 Pa. 304, 308, 311 A.2d 922, 925 (1973).

Even if counsel is required, under a state's rule, at some identifications, it is clear that counsel is not required at all photographic identifications. Thus, in Pennsylvania, counsel would not be required for a photographic display before defendant is arrested and taken into custody.[555] Even if a defendant is in custody, but is in custody on another offense, counsel is not required.[556] The rule requiring counsel at a photographic identification is not retroactive.[557]

B. *Fairness of Photographic Identification*

Irrespective of whether there is a right to counsel at the photographic identification and whether such right was satisfied, the procedure used must be fair.[558] As with lineups[559] and all other confrontation procedures, if the totality of the circumstances indicate that the photographic display is impermissibly suggestive, and thus unreliable as giving rise to a substantial likelihood of misidentification, it is inadmissible.[560]

In order to assure that the photographic display is not impermissibly suggestive, there should be a sufficient number of pictures of different persons.[561] The greater the number of photos shown, the more reliable the identification.[562] The photographs should be as similar as possible as to skin tone, nature of hair, body build, and face construction.[563] While there is no require-

(1973) (concurring opinion of Justice Pomeroy); Commonwealth v. Minifield, 225 Pa. Super. 149, 154 n.6, 310 A.2d 366, 368 n.6 (1973); Commonwealth v. Smith, 452 Pa. 1, 304 A.2d 456 (1973) (holding *Whiting* nonretroactive); Commonwealth v. Jackson, Pa. Super. , A.2d (1974) (*Whiting* overruled).

555. United States *ex rel.* Hickman v. New Jersey, 341 F. Supp. 351 (D.N.J. 1972); United States *ex rel.* Hollman v. Rundle, 329 F. Supp. 1052 (E.D. Pa. 1971), *aff'd*, 461 F.2d 758 (3d Cir. 1972); Commonwealth v. Smith, 452 Pa. 1, 304 A.2d 456 (1973).

556. United States v. Medina, 455 F.2d 461 (3d Cir. 1972); Commonwealth v. Jackson, Pa. Super. , A.2d (1974) (concurring opinion of Jacobs, J.); State v. Farrow, 61 N.J. 434, 294 A.2d 873 (1972).

557. United States v. Higgins, 458 F.2d 461 (3d Cir. 1972); Commonwealth v. Smith, 452 Pa. 1, 304 A.2d 456 (1973).

558. Simmons v. United States, 390 U.S. 377 (1968); Commonwealth v. Williams, 440 Pa. 400, 270 A.2d 226 (1970); United States v. Medina, 455 F.2d 461 (3d Cir. 1972); United States v. Dorsey, 402 F.2d 361 (3d Cir. 1972); Commonwealth v. Smith, 452 Pa. 1, 304 A.2d 456 (1973).

559. *See* text at notes 524-544 *supra*.

560. Neil v. Biggers, 409 U.S. 188 (1972); Simmons v. United States, 390 U.S. 377, 383 (1968); United States v. Sutherland, 428 F.2d 1152 (5th Cir. 1970); *See* Commonwealth v. Minifield, 225 Pa. Super. 149, 310 A.2d 366 (1973).

561. Simmons v. United States, 390 U.S. 377, 386 n.6 (1968).

562. Commonwealth v. Williams, 440 Pa. 400, 270 A.2d 226 (1970); United States *ex rel.* Hollman v. Rundle, 329 F. Supp. 1052 (E.D. Pa. 1971), *aff'd*, 461 F.2d 758 (3d Cir. 1972).

563. *See* United States v. Lee, 459 F.2d 1365 (D.C. Cir. 1972); United

ment that the photographs be of the same portion of the body or taken at the same session, the display should not be so designed as to point to the defendant by the nature of his photograph as compared to the others.[564] Simultaneous exhibition of photographs to a group of witnesses is improper. Each witness should be alone when he views the pictures.[565] Repeated viewings of a defendant in several displays can suggest to the witness that "this must be the man" and might therefore be impermissibly suggestive.[566] However, the mere fact that a defendant is shown in several displays is not necessarily suggestive. It depends on the totality of the circumstances.[567] Similarly, the fact that a witness saw a suspect's picture in a newspaper prior to an identification in a photographic display is not, of itself, unnecessarily or impermissibly suggestive. Again it depends on the "totality of the circumstances."[568]

The police must give fair instructions to the witness.[569] Thus, they may ask a witness to look at certain pictures but may not indicate that they believe the perpetrator is among those persons whose photos have been selected.[570]

Police should keep an accurate record of the display so that it can be reconstructed.[571]

Even if a display is impermissibly suggestive, it can still be reliable enough to show the identity of the perpetrator.[572] Of course, if the witness in fact knows the perpetrator and the display is for discovery of name or other descriptive features, even a grossly suggestive display is not inadmissible.[573]

States *ex rel.* Hollman v. Rundle, 329 F. Supp. 1052 (E.D. Pa. 1971), *aff'd*, 462 F.2d 758 (3d Cir. 1972).

564. *See* United States v. McQueen, 458 F.2d 1049 (3d Cir. 1972); United States v. Harrison, 460 F.2d 270 (2d Cir. 1970).

565. *See* Simmons v. United States, 390 U.S. 377, 386 (1968); United States v. Hopkins, 464 F.2d 816 (D.C. Cir. 1972).

566. Simmons v. United States, 390 U.S. 377, 386 (1968); United States v. Coades, 468 F.2d 1061 (3d Cir. 1972).

567. *See* Simmons v. United States, 390 U.S. 377 (1968) (two viewings); United States v. Coades, 468 F.2d 1061 (3d Cir. 1972) (four viewings); United States v. Higgins, 458 F.2d 461 (3d Cir. 1972) (two viewings).

568. Dearinger v. United States, 468 F.2d 1032 (9th Cir. 1972); United States v. Zeiler, 470 F.2d 717, 720 (3d Cir. 1972); Commonwealth v. Minifield, 225 Pa. Super. 149, 310 A.2d 366 (1973).

569. Simmons v. United States, 390 U.S. 377, 386 (1968).

570. *See* United States *ex rel.* Hickman v. New Jersey, 341 F. Supp. 351 (D.N.J. 1972); United States v. Holiday, 457 F.2d 912 (3d Cir. 1972); United States *ex rel.* Hollman v. Rundle, 329 F. Supp. 1052 (E.D. Pa. 1971), *aff'd*, 461 F.2d 758 (3d Cir. 1972).

571. *See* Commonwealth v. Gibson, 357 Mass. 45, 255 N.E.2d 742 (1970); United States v. Hamilton, 420 F.2d 1292 (D.C. Cir. 1969); Thompson v. State, 85 Nev. 134, 451 P.2d 704, *cert. denied*, 396 U.S. 893 (1969).

572. *See* Neil v. Biggers, 409 U.S. 188 (1972).

573. Commonwealth v. Claitt, 454 Pa. 304, 311 A.2d 922 (1973); *see* United States v. Sutherland, 428 F.2d 1152 (5th Cir. 1970).

XIV. ONE-TO-ONE CONFRONTATIONS

The Supreme Court in *Wade* and *Stovall v. Denno* noted that one-to-one confrontations or "showups" between suspects and witnesses or victims are highly suggestive and thus are looked at with strong disfavor.[574] Most courts have ruled them inadmissible as in violation of due process.[575] However, as indicated by the facts of *Stovall*,[576] such a confrontation can sometimes be justified by necessity, making them not "unnecessarily" or "impermissibly" suggestive.[577]

As most one-to-one confrontations occur prior to the commencement of adversary criminal proceedings,[578] there is no constitutional requirement of counsel at the show-up.[579] And even in those jurisdictions which require counsel for any identification at any stage,[580] proof of "necessity" for the show-up has been considered sufficient to also eliminate the requirement of counsel.[581] Of course, even if a show-up is justified, it must be conducted in the least prejudicial manner possible.[582]

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574. Stovall v. Denno, 388 U.S. 293, 302 (1967); United States v. Wade, 388 U.S. 218, 234 (1967).

575. *See, e.g.,* Foster v. California, 394 U.S. 440, 443 (1969); United States *ex rel.* Rivera v. McKendrick, 448 F.2d 30 (2d Cir. 1971); Wright v. United States, 404 F.2d 1256 (D.C. Cir. 1968).

576. In Stovall v. Denno, 388 U.S. 293 (1967), defendant was brought to the hospital for a one-on-one confrontation. The Court noted that the need for an immediate hospital confrontation was imperative. The witness was hospitalized for major surgery to save her life. "Under these circumstances, the usual police station lineup . . . was out of the question." *Id.* at 302.

577. *See* United States v. Gomes, 464 F.2d 686 (3d Cir. 1972); Russell v. United States, 408 F.2d 1280 (D.C. Cir. 1969). *Cf.* Commonwealth v. Mackey, 447 Pa. 32, 288 A.2d 778 (1972); Commonwealth v. Hall, 217 Pa. Super. 218, 269 A.2d 352 (1970).

578. *See* Kirby v. Illinois, 406 U.S. 682 (1972). *See* notes 494-505 and accompanying text *supra.*

579. In *Kirby,* the defendant was taken to the police station and identified in a one-on-one situation. The Court held that there was no right to counsel as "adversary criminal procedures" had not yet commenced. The Court still left open the question, not necessary for this decision, as to whether the situation was impermissibly suggestive and conducive to irreparable mistaken identification. *See also* State v. Earle, 60 N.J. 550, 292 A.2d 2 (1972).

580. *See* Commonwealth v. Whiting, 439 Pa. 205, 266 A.2d 735 (1970); Commonwealth v. Minifield, 225 Pa. Super. 149, 310 A.2d 366 (1973). *See also* note 507 and accompanying text *supra.*

581. *See* United States v. Gaines, 450 F.2d 186 (3d Cir. 1971); Davis v. State, 13 Md. App. 394, 283 A.2d 432 (1971); Commonwealth v. Hall, 217 Pa. Super. 218, 269 A.2d 352 (1970); *see also* Russell v. United States, 408 F.2d 1280 (D.C. Cir. 1969).

582. *See* United States *ex rel.* Barnwell v. Rundle, 337 F. Supp. 688

A. *Prompt On-The-Scene Identifications*

In evaluating the propriety of one-on-one show-ups immediately after the crime and at the scene, courts have accepted that strong countervailing policies justify their use.[583] Because of the timeliness of the confrontation, there is a greater likelihood of recall. Because the environment has changed less, there is a greater probability of reliability. Finally, such immediate confrontations are essential to achieve the desired goal of expeditious release of innocent suspects and the quick resumption of the search for the offender while the trail is still fresh.[584]

Because these confrontations are suggestive, courts look closely to determine whether they are (1) prompt; (2) at or near the scene of the incident; and (3) fair. Too long a delay in the confrontation could make the identification obtained thereby inadmissible.[585] Too distant a locus from the crime scene,[586] or an arranged confrontation at the police station[587] could also make such an identification impermissible. Too much prompting at the confrontation could make it unduly suggestive.[588] Again, it depends on the "totality of the circumstances," as to whether the identifications, thus secured, are unreliable and thus barred.[589]

(E.D. Pa. 1973); Comonwealth v. Wilson, 450 Pa. 296, 301 A.2d 823 (1973).

583. Spencer v. Turner, 468 F.2d 599 (10th Cir. 1972); United States v. Gaines, 450 F.2d 186 (3d Cir. 1971); Davis v. State, 13 Md. App. 394, 283 A.2d 432 (1971); Commonwealth v. Bumpas, 238 N.E.2d 343 (Mass. 1968); State v. Townes, 461 S.W.2d 761 (Mo. 1971); Commonwealth v. Hall, 217 Pa. Super. 218, 269 A.2d 252 (1970); State v. Wilkerson, 60 N.J. 452, 291 A.2d 8 (1972).

584. Russell v. United States, 408 F.2d 1280 (D.C. Cir. 1969); State v. Wilkerson, 60 N.J. 452, 291 A.2d 8 (1972); Commonwealth v. Hall, 217 Pa. Super. 218, 269 A.2d 352 (1970).

585. *Compare* McRae v. United States, 420 F.2d 1283 (D.C. Cir. 1969) (four hours later); Rivers v. United States, 400 F.2d 935 (5th Cir. 1968); Commonwealth v. Mackey, 447 Pa. 32, 288 A.2d 776 (1972) (one week later), *with* United States v. Savage, 470 F.2d 946 (3d Cir. 1972) (30 minutes later); United States v. Moore, 459 F.2d 1360 (D.C. Cir. 1972) (15 minutes later); Davis v. State, 283 A.2d 432 (Md. 1971) (1½ hours later).

586. *See* United States v. McCoy, 475 F.2d 344 (D.C. Cir. 1973) (thirteen blocks away); Spencer v. Turner, 468 F.2d 599 (10th Cir. 1972) (general area); United States v. Perry, 449 F.2d 1026 (D.C. Cir. 1971).

587. *See* United States *ex rel.* Barnwell v. Rundle, 337 F. Supp. 688 (E.D. Pa. 1973); Virgin Islands v. Callwood, 440 F.2d 1206 (3d Cir. 1971); United States v. Sanchez, 422 F.2d 1198 (2d Cir. 1970); Commonwealth v. Hall, 217 Pa. Super. 218, 269 A.2d 352 (1970); *cf.* State v. Townes, 461 S.W.2d 761 (Mo. 1971).

588. *See* United States *ex rel.* Barnwell v. Rundle, 337 F. Supp. 688 (E.D. Pa. 1973); United States v. Coy, 428 F.2d 683 (7th Cir. 1970); Commonwealth v. Mackey, 447 Pa. 32, 288 A.2d 779 (1972); State v. Clarke, 2 Wash. App. 45, 467 P.2d 369 (1970).

589. United States v. Perry, 449 F.2d 1026 (D.C. Cir. 1971). As discussed earlier, the United States Supreme Court has recently held that in reviewing the "totality of the circumstances," factors external to the show-up may be considered to determine if even an impermissibly suggestive identification is still reliable and thus admissible. *See* notes 543-44 and accompanying text *supra*. In *Neil v. Biggers*, although the confron-

B. *Emergency Confrontations*

One clear example of necessity is the imminent death of the victim.[590] Because such out-of-court identifications are admissible through the testimony of others[591] courts have recognized that the emergency need to preserve evidence justifies otherwise impermissibly suggestive identification procedures.[592] However, to allow such an exception there must be a showing the the witness or victim is *in extremis*, or at the very least that his physical condition prevents him from attending a lineup.[593]

C. *Accidential Confrontations*

If a confrontation has been shown to be truly accidental, there has been no deliberate action by the police justifying application of the exclusionary rule.[594] In such a situation, there can be no

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tation was seven months after the rape incident, it was found admissible. The standards used to determine reliability were identical to those considered applicable to the question of "taint." Neil v. Biggers, 409 U.S. 188 (1972). *See also* United States *ex rel.* Choice v. Brierley, 460 F.2d 68 (3d Cir. 1972). In United States v. Evans, 438 F.2d 162 (D.C. Cir. 1971), the Court allowed an on-the-scene confrontation thirteen days after an assault and burglary speaking often of the reliability of the identification. More recently, the fourth circuit in Stanley v. Cox, 486 F.2d 74 (1973) (4th Cir. 1973), has adapted a two-tiered test of first determining whether a show-up is impermissibly suggestive and, if it is, deciding if it is nevertheless reliable. Of course, a "reliability standard" would mean less of an inquiry into the criteria of prompt, on-the-scene, non-prejudicial confrontations. It seems likely, however, that Pennsylvania courts will continue to divide their inquiry into whether the out-of-court identification was impermissibly suggestive and if so, suppress it. Then, they will determine whether the in-court identification was tainted by it. Reliability will go only to the question of taint. *See* Commonwealth v. Mackey, 447 Pa. 32, 288 A.2d 778 (1972) (show-up inadmissible; in-court admissible); Commonwealth v. Pugh, 226 Pa. Super. 50, 311 A.2d 709 (1973); Commonwealth v. Hall, 217 Pa. Super. 218, 269 A.2d 352 (1970) (where the out-of-court identifications were suppressed; on remand to the Honorable Joseph McGlynn, the in-court identifications of the complainant were found admissible).

590. *See* Stovall v. Denno, 388 U.S. 293, 302 (1967); *see* note 576 *supra*.

591. *See* Taylor v. State, 298 A.2d 332 (Del. 1972); State v. Fennell, 7 Ore. App. 256, 489 P.2d 964 (1972).

592. *See* McRae v. United States, 420 F.2d 1283 (D.C. Cir. 1969); Commonwealth v. Hall, 217 Pa. Super. 218, 269 A.2d 352 (1970).

593. *See* McRae v. United States, 420 F.2d 1283 (D.C. Cir. 1969); Commonwealth v. Hall, 217 Pa. Super. 218, 269 A.2d 352 (1970); *see also* People v. Owens, 126 Ill. App. 379, 261 N.E.2d 785 (1970) (hospitalization with broken leg—confrontation proper). The likelihood that a suspect might flee is not an "emergency situation." United States v. Coy, 428 F.2d 683 (7th Cir. 1970).

594. *See* United States v. Furtney, 459 F.2d 1 (3d Cir. 1972); Commonwealth v. White, 447 Pa. 331, 290 A.2d 246 (1972); *cf.* United States v. Venere, 410 F.2d 144 (5th Cir. 1969) (employer asks employee to go to

right to counsel as it would require a suspect to be accompanied by his lawyer every minute. Similarly, as it is a confrontation, the likelihood of suggestiveness is minimal. Of course, courts carefully scrutinize any such confrontations to make sure that they are not arranged. Intentional confrontations, not complying with the right to counsel, nor exempt as being prompt and on-the-scene, would be inadmissible.[595]

If both the victim and the suspect are injured and taken to the same hospital, a spontaneous identification is admissible.[596] Similarly, if the suspect is seen entering or in the hall of the police station,[597] or a courtroom,[598] or on a street,[599] a spontaneous identification is admissible.

XV. In-Court Identifications

The exclusionary rule as to identifications applies to *out-of-court* identifications, whether lineups,[600] show-ups[601] or photographic arrays.[602] An in-court identification could also be excluded but only if it was based in any way on the prior out-of-court confrontation.[603]

A. *No Prior Identifications*

There is no requirement that an in-court identification be preceded by a prior out-of-court confrontation.[604] Thus, if a confrontation occurs for the first time at a judicial proceeding, rather than by a police procedure, with the required presence of counsel[605]

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first aid room to see suspect; proper—"*Stovall* and *Wade* were concerned with confrontations arranged by the police. . . .")

595. *See* United States v. Furtney, 459 F.2d 1 (3d Cir. 1972) (remanded to see if confrontation unintentional); United States *ex rel.* Woodward v. New Jersey, 474 F.2d 694 (3d Cir. 1972); United States v. Coy, 428 F.2d 683 (7th Cir. 1970) (arranged); State v. Clark, 2 Wash. App. 45, 467 P.2d 369 (1970) (arranged).

596. Billenger v. State, 9 Md. App. 628, 267 A.2d 275 (1970).

597. Commonwealth v. White, 447 Pa. 331, 290 A.2d 246 (1972); Commonwealth v. Jones, 220 Pa. Super. 214, 283 A.2d 707 (1971).

598. *See* United States v. Furtney, 459 F.2d 1 (3d Cir. 1972).

599. United States v. Neverson, 463 F.2d 1224 (D.C. Cir. 1972); Commonwealth v. Pitts, 450 Pa. 359, 301 A.2d 646 (1973).

600. United States v. Wade, 388 U.S. 218, 236 (1967): "Since it appears that there is grave potential for prejudice . . . *in the pre-trial lineup* . . ." (emphasis added).

601. *See* Stovall v. Denno, 388 U.S. 293 (1967).

602. *See* Simmons v. United States, 390 U.S. 377, 384 (1968); "convictions . . . following a *pre-trial identification by photograph* will be set aside . . . if . . . so impermissibly suggestive as to give aim to a very substantial likelihood of irreparable misidentification." (emphasis added).

603. United States v. Wade, 388 U.S. 218, 241 (1967).

604. United States v. Dorantes, 471 F.2d 298 (3d Cir. 1972); United States v. Hill, 449 F.2d 743 (3d Cir. 1971); Commonwealth v. Jennings, 446 Pa. 294, 285 A.2d 143 (1971).

605. *See* Argersinger v. Hamlin, 407 U.S. 25 (1972) (counsel required where jail possible); Coleman v. Alabama, 399 U.S. 1 (1970) (counsel at

and the full opportunity to cross-examine the witness,[606] any identification made is clearly admissible.[607] The fact that it is a one-on-one confrontation or otherwise very suggestive is irrelevant.[608]

Similarly, if a witness or complainant has failed to identify a defendant at a pre-trial confrontation, a later in-court identification can not be based on that and is thus admissible.[609] The prior failure to identify is, of course, relevant as to the weight of the in-court identifications.[610]

B. *Taint*

When an out-of-court identification, whether made during the course of an improper lineup,[611] photographic identification[612] or show-up[613] is excluded, the court cannot admit the in-court iden-

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preliminary hearing); Gideon v. Wainwright, 372 U.S. 339 (1963) (counsel at felony trials).

606. *See* United States *ex rel.* Riffert v. Rundle, 464 F.2d 1348 (3d Cir. 1972); United States v. Hardy, 451 F.2d 905 (3d Cir. 1971); United States v. Isenberg, 343 F. Supp. 25 (W.D. Pa. 1972); State v. Ruggiero, 115 N.J. Super. 258, 279 A.2d 128 (1971).

607. *See* United States v. Dorantes, 471 F.2d 298 (3d Cir. 1972) (trial); United States v. Hardy, 451 F.2d 905 (3d Cir. 1972) (preliminary hearing); United States v. Hill, 449 F.2d 743 (3d Cir. 1971) (trial); United States *ex rel.* Riffert v. Rundle, 464 F.2d 1348 (3d Cir. 1972) (preliminary hearing); United States v. Isenberg, 343 F. Supp. 25 (W.D. Pa. 1972) (suppression hearing); Commonwealth v. Jennings, 446 Pa. 294, 285 A.2d 143 (1971).

608. *See* United States *ex rel.* Riffert v. Rundle, 464 F.2d 1348 (3d Cir. 1972) (one-on-one; defendant handcuffed at preliminary hearing); United States v. Moss, 410 F.2d 386 (3d Cir. 1969) (one-on-one; defendant only member of his race present in courtroom); Commonwealth v. Jennings, 446 Pa. 294, 285 A.2d 143 (1971).

609. *See* United States v. Gaines, 450 F.2d 186 (3d Cir. 1971); Commonwealth v. Baker, 220 Pa. Super. 86, 283 A.2d 716 (1971).

610. *See* Commonwealth v. Baker, 220 Pa. Super. 86, 283 A.2d 716 (1971); *see also* Adams v. United States, 302 A.2d 232 (D.C. Cir. 1973); Commonwealth v. White, 447 Pa. 331, 290 A.2d 246 (1972); Commonwealth v. Jennings, 446 Pa. 294, 285 A.2d 143 (1971); Commonwealth v. Minifield, 225 Pa. Super. 149, 310 A.2d 366 (1973).

611. *See, e.g.,* Commonwealth v. Spencer, 442 Pa. 328, 275 A.2d 299 (1971). *See also* Commonwealth v. Wilson, 450 Pa. 296, 301 A.2d 823 (1973) (taint found).

612. *See, e.g.,* United States v. Holiday, 457 F.2d 912 (3d Cir. 1972); United States v. McQueen, 458 F.2d 1049 (3d Cir. 1972); United States v. Zeiler, 447 F.2d 993 (3d Cir. 1971); United States *ex rel.* Hickman v. New Jersey, 341 F. Supp. 351 (D.N.J. 1972); Commonwealth v. Williams, 440 Pa. 400, 270 A.2d 226 (1970); Commonwealth v. Pennebaker, 224 Pa. Super. 512, 306 A.2d 921 (1973).

613. *See, e.g.,* Commonwealth v. Burton, 452 Pa. 521, 307 A.2d 277 (1973); Commonwealth v. Jones, 220 Pa. Super. 214, 283 A.2d 707 (1971); Commonwealth v. Pugh, 226 Pa. Super. 50, 311 A.2d 709 (1973).

tification without first determining that it was not tainted by the prior illegal confrontation.[614] The proper inquiry is whether the in-court identification came as a result of "exploitation" of the impermissible confrontation or rather by means sufficiently distinguishable as to purge the primary taint.[615]

If a pre-trial identification is inadmissible,[616] the burden is on the state to show by clear and convincing evidence that the in-court identification had an origin independent of the pre-trial confrontation.[617] Again, resolution of the taint issue depends upon the "totality of the circumstances."[618]

One clear indication of lack of taint is that the victim or complainant has seen the perpetrator before and knows him, albeit not by name.[619] Other factors are indicated by *Wade* itself:[620]

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614. *See* Gilbert v. California, 388 U.S. 263 (1968); United States *ex rel.* Choice v. Brierley, 460 F.2d 68 (3d Cir. 1972); Commonwealth v. Hall, 217 Pa. Super. 218, 269 A.2d 352 (1970).

615. United States v. Wade, 388 U.S. 218, 241 (1967), *citing* Wong Sun v. United States, 371 U.S. 471, 488 (1963). *See* Commonwealth v. Futch, 447 Pa. 389, 396, 290 A.2d 417, 420 (1972); Commonwealth v. Spencer, 442 Pa. 328, 332, 275 A.2d 299, 302 (1971).

616. One process commonly used to raise the taint issue at a pre-trial suppression hearing is for the prosecution to call the witness or complainant to the stand to make an in-court identification of the defendant, ignoring prior identifications. The defense may then choose to bring out the facts of the prior identification to show it was improper and to raise the issue that the in-court identification was tainted by an improper pre-trial confrontation. The prosecution would then seek to justify the legality of the out-of-court procedure or meet its burden that, in any event, the in-court identification is not a "fruit of the poisonous tree." *See* A. Davis and H. Uviller, *The Role of the Defense Lawyer at a Lineup*, 4 CRIM. L. BUL. 273, 294-95 (1968). Ordinarily the trial court should make separate findings as to the propriety of the out-of-court identification and as to taint. Failure to make a finding as to taint, even where the judge believes the out-of-court identification proper, could lead to reversal or remand by the appellate court if it disagrees. *See* Gilbert v. California, 388 U.S. 263 (1967) (reversal); United States v. Zeiler, 447 F.2d 993 (3d Cir. 1971) (remand); Commonwealth v. Hall, 217 Pa. Super. 218, 269 A.2d 352 (1970). Inclusion of both findings often leads to affirmance of the in-court identification by the appellate court, even without consideration of the out-of-court identification. *See* United States v. Rabb, 450 F.2d 344 (3d Cir. 1971); Commonwealth v. Pitts, 450 Pa. 359, 301 A.2d 646 (1973); Commonwealth v. Jones, 220 Pa. Super. 214, 283 A.2d 707 (1971).

617. United States v. Wade, 388 U.S. 218, 240 (1967); United States v. Holiday, 457 F.2d 912 (3d Cir. 1972); Commonwealth v. Whiting, 439 Pa. 205, 266 A.2d 738 (1970).

618. United States v. Wade, 388 U.S. 218, 242 (1967); Commonwealth v. Williams, 440 Pa. 400, 270 A.2d 226 (1970); Commonwealth v. Minifield, 225 Pa. Super. 149, 310 A.2d 366 (1973).

619. Commonwealth v. Pitts, 450 Pa. 359, 301 A.2d 646 (1973); Commonwealth v. Rankins, 441 Pa. 401, 272 A.2d 886 (1971); Commonwealth v. Johnson, 226 Pa. Super. 1, 311 A.2d 694 (1973); Commonwealth v. Pugh, 226 Pa. Super. 50, 311 A.2d 709 (1973).

620. United States v. Wade, 388 U.S. 218, 241 (1967):

> Application of this test [of taint] . . . requires consideration of various factors; for example, the prior opportunity to observe the alleged criminal act, the existence of any discrepancy between any pre-lineup description and the defendant's actual description, any identification prior to lineup of another person, the identification

(1) Was there a prior opportunity to observe the defendant at the time of the criminal act? The longer period a witness has to view the perpetrator at the time of the crime, the more likely it is that his in-court identification is based on his recollection of the individual from the time of the crime.[621] Of course, lighting, distance from the perpetrator, and the nature of the view are all relevant factors.[622]

(2) What was the certainty and specificity of the in-court identification? The more sure a witness is of his identification from the time of the incident, even under rigorous cross-examination, the more likely is its independent source.[623]

(3) What was the prejudicial effect of the excluded confrontation? The more suggestive an out-of-court identification, the more

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by picture of the defendant prior to the lineup, failure to identify the defendant on a prior occasion, and the lapse of time between the alleged act and the lineup identification. It is also relevant to consider those facts which despite the absence of counsel, are disclosed concerning the conduct of the lineup.

621. United States v. Higgins, 458 F.2d 461 (3d Cir. 1972) (1½ minutes); United States v. Zeiler, 447 F.2d 993 (3d Cir. 1971) (3-6 minutes); United States *ex rel.* Choice v. Brierley, 363 F. Supp. 178 (E.D. Pa. 1973); United States *ex rel.* Hickman v. New Jersey, 341 F. Supp. 351 (D.N.J. 1972) (more than one hour); Commonwealth v. Jennings, 446 Pa. 294, 285 A.2d 143 (1971) (10 minutes); Commonwealth v. Spencer, 442 Pa. 328, 275 A.2d 299 (1971) (5-10 minutes); Commonwealth v. Thomas, 444 Pa. 436, 282 A.2d 693 (1971); Commonwealth v. Minifield, 225 Pa. Super. 149, 310 A.2d 366 (1973) (3-4 minutes); Commonwealth v. Foster, 219 Pa. Super. 127, 280 A.2d 602 (1971).

622. United States v. McCoy, 475 F.2d 344 (D.C. Cir. 1973); United States v. Higgins, 458 F.2d 461 (3d Cir. 1972) (full face, no mask); United States v. Zeiler, 447 F.2d 993 (3d Cir. 1971); United States v. Randolph, 443 F.2d 729 (D.C. Cir. 1970); People v. Airheart, 262 Cal. App. 2d 673, 68 Cal. Rptr. 857 (1968) (lighting); Commonwealth v. Burton, 452 Pa. 521, 307 A.2d 277 (1973) (well lit; inches from the defendant); Commonwealth v. Thomas, 444 Pa. 436, 282 A.2d 693 (1972) (good lighting, no visual obstructions; close proximity); Commonwealth v. Jennings, 446 Pa. 294, 285 A.2d 143 (1971) (close range; well lit); Commonwealth v. Minifield, 225 Pa. Super. 149, 310 A.2d 366 (1973) (brightly lit; long and close view); Commonwealth v. Pennebaker, 224 Pa. Super. 512, 306 A.2d 921 (1973) (unmasked).

Included within the "nature of the view" are the ability to discern distinctive physical characteristics on the perpetrator at the time of the incident and what special ability and training a witness has as to identifications. *See* United States v. Wade, 388 U.S. 218 (1967).

623. Commonwealth v. Pitts, 450 Pa. 359, 301 A.2d 646 (1973) (specificity of recollection); Commonwealth v. Spencer, 442 Pa. 328, 275 A.2d 299 (1971); Commonwealth v. Thomas, 444 Pa. 436, 282 A.2d 693 (1971) (positive and unequivocal); Commonwealth v. Minifield, 225 Pa. Super. 149, 310 A.2d 366 (1973) (unequivocal); Commonwealth v. Pennebaker, 224 Pa. Super. 512, 306 A.2d 921 (1973) (positive and unwavering); Commonwealth v. Jones, 220 Pa. Super. 214, 283 A.2d 707 (1971) (unequivocal). *See also* United States v. Harris, 432 F.2d 686 (D.C. Cir. 1970); United States v. Black, 412 F.2d 687 (6th Cir. 1969).

likely it is that it is the basis of the in-court identification.[624] Thus, if an identification is excluded because of the absence of counsel, but not otherwise improper, there would ordinarily not be any taint problem.[625]

(4) Were there any discrepancies between descriptions given to the police and the actual appearance? Substantial and unexplained differences could indicate that the in-court testimony was not based on recollection of the incident but rather on the out-of-court confrontation. Minor discrepancies, however, would ordinarily not affect admissibility but would be relevant only to weight of the evidence at trial.[626]

(5) Were there any prior identifications? Even if an out-of-court identification is inadmissible, it is still relevant to the taint issue. Consistent identification of the defendant by the witness would be very strong evidence of the certainty of the in-court identification as being based on the time of the incident.[627] Of course, a prior failure to identify, or an identification of a different individual, could indicate the unreliability and thus inadmissibility of the witness's testimony. Such prior failures to identify could sometimes be explained and thus the issue becomes again not admissibility but weight.[628]

(6) What was the lapse of time between the criminal act and the subsequent identification? The longer the delay between event and identification, the more likely that the later in-court identification is based on the more recent confrontation rather than the earlier incident.[629]

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624. United States v. Higgins, 458 F.2d 461 (3d Cir. 1972) (non-suggestive); United States v. Zeiler, 447 F.2d 993 (3d Cir. 1971) (non-suggestive).

625. *See* United States v. Holiday, 457 F.2d 912 (3d Cir. 1972) (no counsel at photographic array); Commonwealth v. Minifield, 225 Pa. Super. 149, 310 A.2d 366 (1973) (same).

626. Commonwealth v. Spencer, 442 Pa. 328, 275 A.2d 299 (1971); *cf.* Commonwealth v. Burton, 452 Pa. 521, 307 A.2d 277 (1973) (exact description); United States v. Higgins, 458 F.2d 461 (3d Cir. 1972) (no substantial discrepancies); United States v. Zeiler, 447 F.2d 993 (3d Cir. 1971) (description close); Commonwealth v. White, 447 Pa. 331, 290 A.2d 246 (1972) (weight not admissibility); Commonwealth v. Thomas, 444 Pa. 436, 282 A.2d 693 (1971) (accurate description); Commonwealth v. Minifield, 225 Pa. Super. 149, 310 A.2d 366 (1973) (minor discrepancies but general conformity); Commonwealth v. Pennebaker, 224 Pa. Super. 512, 306 A.2d 921 (1973) (accurate detailed description). *See also* Massen v. State, 41 Wis. 2d 245, 163 N.W.2d 616 (1969).

627. Commonwealth v. Spencer, 442 Pa. 328, 275 A.2d 299 (1971); Commonwealth v. Minifield, 225 Pa. Super. 149, 310 A.2d 366 (1973). *See also* United States v. Higgins, 458 F.2d 461 (3d Cir. 1972); United States v. Randolph, 443 F.2d 729 (D.C. Cir. 1970).

628. *See* Commonwealth v. Baker, 220 Pa. Super. 86, 283 A.2d 716 (1971) (explained).

629. *See* Commonwealth v. Burton, 452 Pa. 521, 307 A.2d 277 (1973) (on-the-scene with 5-10 minutes); Commonwealth v. Pennebaker, 224 Pa. Super. 512, 306 A.2d 921 (short interval); *cf.* United States v. Higgins, 458 F.2d 461 (3d Cir. 1972) (no "undue delay"); Hill v. State, 6 Md. App. 555, 252 A.2d 259 (1969).

XVI. IDENTIFICATIONS, ARRESTS AND ARRAIGNMENTS

Ordinarily, to place a defendant in a lineup, the police must have consent or probable cause to have arrested him[630] or the defendant must have already been in custody.[631] However, some courts have held that "reasonable suspicion"[632] might be sufficient to allow a defendant to be taken back to the scene for a prompt confrontation.[633] If there is illegal detention, it might taint the out-of-court identification. However such detention for the purposes of confrontation alone cannot taint the in-court identification, if such in-court identification has an independent basis.[634]

Similarly, in a jurisdiction which requires a speedy preliminary arraignment after arrest, unreasonable delay in that arraignment might lead to the suppression of any out-of-court identification which is a product of that delay. But again, the delay does not automatically oust the in-court identification. The court must determine whether the in-court identification is admissible, as based on a recollection of the criminal episode, or inadmissible, as tainted by the prohibited out-of-court confrontation.[635]

PART IV—DOUBLE JEOPARDY

XVII. INTRODUCTION

Prior to 1969, each state was free to apply its own constitutional and statutory provisions as to double and former jeopardy.[636] The Fifth Amendment of the United States Constitution, "nor shall any person be twice put in jeopardy of life or limb,"[637] applied only to cases in the Federal Courts.[638]

In Pennsylvania, the attachment of jeopardy was limited. The

630. United States *ex rel.* Hollman v. Rundle, 329 F. Supp. 1052 (E.D. Pa. 1971), *aff'd*, 461 F.2d 758 (3d Cir. 1972). *See* United States *ex rel.* Carter v. Mancusi, 342 F. Supp. 1356 (S.D.N.Y. 1971), *aff'd*, 460 F.2d 1018 (2d Cir. 1972); Butcher v. Rizzo, 317 F. Supp. 899 (E.D. Pa. 1970).

631. United States v. Jones, 403 F.2d 498 (7th Cir. 1968); Rigney v. Hendrick, 355 F.2d 710 (3d Cir. 1965), *cert. denied*, 384 U.S. 975 (1966).

632. *See* Terry v. Ohio, 392 U.S. 1 (1968).

633. United States v. Moore, 459 F.2d 1360 (D.C. Cir. 1972); United States v. Rodriquez, 459 F.2d 983 (9th Cir. 1972); Wise v. Murphy, 275 A.2d 203 (D.C. Ct. App. 1971).

634. Commonwealth v. Garvin, 448 Pa. 258, 293 A.2d 33 (1972).

635. Commonwealth v. Futch, 447 Pa. 389, 290 A.2d 417 (1972).

636. For a discussion of the various state limitations prior to 1969 see Note, 75 YALE L.J. 262 n.3 (1965); Note, 77 HARV. L. REV. 1272, 1286-88 (1964).

637. U.S. CONST. amend. V.

638. Palko v. Connecticut, 302 U.S. 319 (1937).

State constitutional prohibition of double jeopardy[639] was limited to capital cases.[640] The only limitations applicable to all criminal cases were the common law and statutory restrictions precluding retrial after acquittal or conviction.[641]

On June 23, 1969, the United States Supreme Court, in *Benton v. Maryland*,[642] held that the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution was applicable to the states through the Fourteenth Amendment. Moreover this Federal double jeopardy prohibition was later made fully retroactive.[643] In addition, on June 6, 1973, the new Pennsylvania Crimes Code[644] became effective, providing new statutory restrictions on successive prosecution.[645]

Unlike the "exclusionary rules" for confessions, searches and seizures, and identifications, the double jeopardy prohibition does not merely eliminate the use of evidence, but can completely preclude prosecution of charges, issues, or defendants and can limit sentencing ranges.

The double jeopardy rules include: the concepts of *former jeopardy*, where a defendant has been exposed to *possiblity* of being convicted of a criminal offense;[646] the pleas of *autrefois acquit* or *convict* which precludes subsequent prosecution after a determination has been reached on the merits;[647] the restrictions on *successive prosecutions* arising out of the *same criminal transaction;*[648]

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639. PA. CONST. art. I, § 10: "No person shall for the same offense, be twice put in jeopardy of life or limb."

640. Commonwealth v. Baker, 413 Pa. 105, 109-12, 192 A.2d 382, 384-86 (1964).

641. PA. STAT. ANN. tit. 19, § 464 (1964) provides:

> In any plea of autrefois acquit or autrefois convict, it shall be sufficient for any defendant to state that he has been lawfully convicted or acquitted, as the case may be, of the offenses charged in the indictment.

PA. STAT. ANN., tit. 19, § 831 (1964) provides:

> If upon trial of any person for any misdemeanor, it shall appear that the facts given in evidence amount to a felony . . . , no person tried for such misdemeanor shall be liable afterwards to be prosecuted for a felony on said facts. . . .

The concepts of *autrefois acquit* and *autrefois convict* were common law principles, applicable in Pennsylvania by the procedures described above. *See* Commonwealth *ex rel.* Papy v. Maroney, 417 Pa. 368, 207 A.2d 514 (1965).

642. Benton v. Maryland, 395 U.S. 784 (1969).

643. *See* Ashe v. Swenson, 397 U.S. 436, 437 n.1 (1970); Commonwealth v. Richbourg, 442 Pa. 147, 275 A.2d 345 (1971); Commonwealth v. Brooks, 454 Pa. 75, 309 A.2d 732 (1973).

644. PA. STAT. ANN. tit. 18, § 1 *et seq.* (Supp. 1973).

645. PA. STAT. ANN. tit 18, §§ 109-112 (Supp. 1973).

646. *Ex parte* Lange, 85 U.S. (18 Wall.) 163 (1873); *see* notes 651-700 and accompanying text *infra.*

647. Commonwealth *ex rel.* Papy v. Maroney, 417 Pa. 368, 207 A.2d 814 (1965). *See* note 641 *supra. See also* notes 701-36 and accompanying text *infra.*

648. Commonwealth v. Campana, 452 Pa. 233, 304 A.2d 432 (1973), *remanded* U.S. , 94 S. Ct. 73 (1973). Included within this restriction

the restrictions on *successive prosecutions in different jurisdictions* for the same criminal events;[649] and restrictions on *mutiple or increased punishment* for the same criminal episode.[650]

XVIII. Former Jeopardy

If prosecution is terminated prior to verdict, re-prosecution will be prohibited if the defendant has been so exposed to the *possibility* of conviction that jeopardy must be held to attach.[651] Generally, an accused is not in jeopardy until the entire jury, including alternates, is impaneled and sworn,[652] or, in a non-jury case, until the court has begun to hear evidence.[653]

Thus, where a case is dismissed at preliminary hearing, a rearrest is allowable.[654] Where a defective indictment or information is dismissed pre-trial, reprosecution is not prohibited.[655] Similarly *a nolle proseque* does not prevent another indictment from being found for the same offense or the original *"nolle prosse"* being opened.[656] If a case is dismissed "for want of prosecution," later prosecution on the same charges is not barred unless there are

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is the application of rules of collateral estoppel. Ashe v. Swenson, 397 U.S. 436 (1970). *See* notes 737-62 and accompanying text *infra.*

649. Commonwealth v. Mills, 447 Pa. 163, 286 A.2d 638 (1971). *See* notes 763-73 and accompanying text *infra.*

650. North Carolina v. Pearce, 395 U.S. 711 (1969); *see* notes 774-815 and accompanying text *infra.*

651. *See* Downum v. United States, 372 U.S. 734 (1965); United States v. Perez, 22 U.S. (9 Wheat.) 579 (1824).

652. Wade v. Hunter, 336 U.S. 684 (1949); Commonwealth v. Robinson, 317 Pa. 321, 176 A. 908 (1935); Commonwealth v. Curry, 287 Pa. 553 (1926). The new Crimes Code, however, prohibits reprosecution after "the former prosecution was improperly terminated after the first witness was sworn." Pa. Stat. Ann. tit. 18, § 109(4) (Supp. 1973). The Comment to the Model Penal Code provision 1.09 indicates that it was the intent of the drafters to change existing law and to have jeopardy attach, even in a jury trial, only after the first witness is sworn. ALI Model Penal Code § 1.09 (Tentative Draft No. 5 at 56).

653. Commonwealth v. Culpepper, 221 Pa. Super. 472, 293 A.2d 122 (1972). The new Crimes Code once the first witness is sworn. Pa. Stat. Ann., tit. 18, § 109(4) (Supp. 1973). *See also* Model Penal Code § 1.09 at 53 (Tentative Draft No. 5 1956) [hereinafter cited as M.P.C. Comments].

654. Commonwealth *ex rel.* Riggins v. Superintendent, 438 Pa. 160, 263 A.2d 754 (1970); Commonwealth v. Harbold, 435 Pa. 501, 257 A.2d 553 (1969).

655. *See* Commonwealth v. Curry, 287 Pa. 553, 135 A. 316 (1926); *see also* United States v. Beard, 414 F.2d 1014 (3d Cir. 1969); Eubanks v. Louisiana, 356 U.S. 584 (1958).

656. United States v. Fox, 130 F.2d 56 (3d Cir.), *cert. denied*, 317 U.S. 666 (1942); Commonwealth v. Hart, 427 Pa. 618, 235 A.2d 391 (1967).

circumstances indicating prejudice.[657]

Of course, even where not precluded by the double jeopardy prohibition, reprosecution may be barred[658] because of speedy trial restrictions,[659] statutes of limitation,[660] or other legal doctrines precluding trial.[661]

Whether a second trial is allowable if a trial has been aborted is a question of fact in each case. The test is whether "taking all circumstances into consideration" there was "manifest necessity for the act or the ends of public justice would be defeated."[662] The policy behind this rule requiring manifest necessity for declaration of a mistrial is the desire to avoid "[opening] the door for the indulgence of caprice and partiality by the court, to the possible and probable prejudice of the defendants."[663] The ban to reprosecution is seen as effectuating the policy that a defendant may not be deprived of his "valued right to have his trial completed by a particular tribunal."[664] In each and every case, the court considering a jeopardy allegation must balance the potential harassment of a defendant and his right to a particular tribunal against the ends of public justice and the propriety of the state's actions.[665]

A. *Hung Jury*

It is generally held that a dismissal because of inability of the jury to reach a verdict is based on manifest necessity and thus that

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657. United States v. Igoe, 331 F.2d 766 (7th Cir. 1964), *cert. denied,* 380 U.S. 342 (1965); Masiello v. United States, 304 F.2d 399 (D.C. Cir. 1962).

658. PA. STAT. ANN. tit. 18, § 109(2) (Supp. 1973) prohibits reprosecution after a final order or judgment "which necessarily required a determination inconsistent with a fact or legal proposition that must be established for conviction of the offense." This provision establishes the principle of *res judicata,* for legal bars to prosecution. See Pennsylvania Bar Association, Comments Relating to the Provisions of the Crimes Code at 3 (1972) [hereinafter cited as PBA Comments].

659. *See* U.S. CONST. *amend.* VI; PA. R. CRIM. PROC. 1100.

660. *See* PA. STAT. ANN. tit. 18, § 108 (Supp. 1973); United States v. Oppenheimer, 242 U.S. 85 (1916); Commonwealth v. Cardonick 448 Pa. 322 (1972).

661. Examples of other legal bars are determinations that a defendant has been pardoned or that he has been granted immunity. M.P.C. Comments at 50.

662. United States v. Perez, 22 U.S. (9 Wheat.) 579, 580 (1824). *See* Illinois v. Somerville, 410 U.S. 458 (1973); United States v. Jorn, 400 U.S. 470 (1971); Downum v. United States, 372 U.S. 734 (1964); United States v. Tateo, 377 U.S. 403 (1964); Gori v. United States, 367 U.S. 364 (1961); Commonwealth v. Brown, 451 Pa. 395 (1973); Commonwealth *ex rel.* Montgomery v. Myers, 422 Pa. 180, 220 A.2d 859 (1966).

663. Downum v. United States, 372 U.S. 734, 738 (1964), *citing* United States v. Watson, 28 Fed. Cases 499, 500-01 (1869).

664. United States v. Jorn, 400 U.S. 470, 486 (1971); Commonwealth v. Brooks, 454 Pa. 75, 309 A.2d 732 (1973); Commonwealth v. Richbourg, 442 Pa. 147, 275 A.2d 345 (1971).

665. Illinois v. Somerville, 410 U.S. 458 (1973); United States v. Tinney, 473 F.2d 1085 (3d Cir. 1973).

there is no bar to reprosecution.[666] However, the discretion to grant a mistrial because of a hung hury is not absolute. The judge must make an inquiry of the panel as to their condition and as to their division and deadlock. Some questioning must be undertaken as to their progress in reaching a verdict.[667] Premature discharge of a jury is a violation of the double jeopardy clause.[668] If there is in fact a deadlock and the court is convinced that continuation of the deliberations would be fruitless or even injurious to the jurors, discharge, with or without the defendant's consent, is no bar to reprosecution.[669] Of course, if a defendant specifically requests a mistrial because of deadlock, there is no bar.[670] But mere acquiescence is not sufficient to justify a premature dismissal.[671]

B. *Request By Defendant*

Ordinarily, if a defendant requests a mistrial, he cannot later seek to bar reprosecution under the double jeopardy clause.[672] Even if the defendant's request was prompted by improper prosecutorial acts, there is no bar if these acts were not purposeful attempts to cause a mistrial.[673] However, if the request for the mistrial is based on overreaching prosecutorial misconduct, defendant is being effectively deprived of his right to be tried by an impartially selected jury, and retrial may be barred.[674]

C. *Sua Sponte Or Request By Prosecution*

Under Federal Constitutional law, a judge may, in his discretion, declare a mistrial on his own motion for "manifest neces-

666. United States v. Perez, 22 U.S. (9 Wheat.) 579 (1824); Commonwealth v. Brown, 451 Pa. 395, 301 A.2d 876 (1973); M.P.C. Comments at 55.

667. United States *ex rel.* Russo v. Superior Ct., 483 F.2d 7 (3d Cir. 1973); Commonwealth v. Brooks, 454 Pa. 75, 311 A.2d 732 (1973).

668. United States *ex rel.* Russo v. Superior Ct., 483 F.2d 7 (3d Cir. 1973); Commonwealth v. Baker, 413 Pa. 105, 196 A.2d 382 (1964); United States v. Lansdown, 460 F.2d 164 (4th Cir. 1972).

669. Commonwealth v. Brown, 451 Pa. 395, 301 A.2d 876 (1973).

670. United States v. Brahm, 459 F.2d 546 (3d Cir. 1972); Commonwealth v. Shaffer, 447 Pa. 91, 288 A.2d 727 (1972).

671. United States *ex rel.* Russo v. Superior Ct., 483 F.2d 7 (3d Cir. 1973).

672. M.P.C. Comments at 53; Commonwealth v. Shaffer, 447 Pa. 91, 288 A.2d 727 (1972); Commonwealth v. Reeves, 218 Pa. Super. 88, 272 A.2d 197 (1970); Commonwealth v. Kubachi, 208 Pa. Super. 523, 224 A.2d 80 (1966); *see* Wade v. Hunter, 336 U.S. 684 (1949).

673. Gori v. United States, 367 U.S. 364 (1961); Commonwealth *ex rel.* Montgomery v. Myers, 422 Pa. 180, 220 A.2d 859 (1966).

674. *See* Commonwealth v. Culpepper, 221 Pa. Super. 472, 293 A.2d 122 (1972).

sity."[675] Similarly, a request by the prosecutor, if found by the judge to indicate necessity, does not automatically mean jeopardy,[676] although it does create a higher probability of it.[677] In the case of mistrials declared by the court *sua sponte* or the prosecutor's motion, acquiesence by the defendant or his counsel is an important element. Where defendant objects, hence expressing a desire for a particular tribunal, the discretion of the trial judge to discharge a jury before verdict is "only to be exercised in very extraordinary and striking circumstances."[678] In any event, a careful review must be made of the events leading to the mistrial and the alternatives available. Prosecutorial misconduct indicating an attempt to deprive a defendant of a particular tribunal bars reprosecution.[679] Other prosecutorial actions, possibly improper but based on legal technicalities or not indicating overreaching, do not so bar.[680]

Certain situations have traditionally been considered to indicate "manifest necessity" so as to justify a mistrial and not bar reprosecution.[681] *Physical necessity,* such as the disappearance, death or illness of the judge, material witness, or defendant can justify a mistrial and not bar retrial, even if the mistrial is declared at the prosecutor's or the court's own motion.[682] However, alternative remedies must be examined first.[683] Thus, if a defendant is unavailable, continuances should be allowed to give the prosecution time to find him. Premature discharge bars retrial.[684] Similarly, if a witness is ill or unavailable, an inquiry must be undertaken as to his condition and documentation must be supplied.[685] Of course, if the illness or unavailability of a witness was or should have been known before trial by the prosecutor, the granting of the mistrial over defendant's objection deprives the defendant of his right to that fact-finder and jeopardy attaches.[686]

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675. Gori v. United States, 367 U.S. 364 (1961); Wade v. Hunter, 336 U.S. 684 (1949); Simmons v. United States, 142 U.S. 148 (1891); Commonwealth v. Wright, 439 Pa. 198, 266 A.2d 651 (1970).

676. Illinois v. Somerville, 410 U.S. 458 (1973); United States *ex rel.* Gibson v. Ziegele, 479 F.2d 773 (3d Cir. 1973).

677. Downum v. United States, 372 U.S. 734 (1964).

678. United States v. Ball, 163 U.S. 662, 669 (1896); Commonwealth v. Shaffer, 447 Pa. 91, 288 A.2d 727 (1972).

679. Commonwealth v. Richbourg, 442 Pa. 147, 275 A.2d 345 (1971); Commonwealth v. Warfield, 424 Pa. 555, 227 A.2d 177 (1967).

680. Illinois v. Somerville, 410 U.S. 458 (1973); Commonwealth v. Wright, 439 Pa. 198, 266 A.2d 651 (1970); Commonwealth *ex rel.* Montgomery v. Myers, 422 Pa. 180, 220 A.2d 859, *cert. denied,* 385 U.S. 963 (1966).

681. *See* M.P.C. Comments at 54-55.

682. *See* United States *ex rel.* Gibson v. Ziegele, 479 F.2d 773 (3d Cir. 1973); *In re* Earle, 316 Mich. 295, 25 N.W.2d 202 (1946).

683. United States v. Jorn, 400 U.S. 470 (1971); United States v. Tinney, 473 F.2d 1085 (3d Cir. 1973).

684. United States v. Tinney, 473 F.2d 1085 (3d Cir. 1973).

685. Commonwealth v. Ferguson, 446 Pa. 24, 285 A.2d 189 (1971).

686. Downum v. United States, 372 U.S. 734 (1963).

Similarly, if the illness or unavailability is for an easily replaceable party, such as a juror, who can be replaced by an alternate, or a prosecutor, who can be replaced by another member of the staff, a mistrial without the defendant's request or consent is improper.[687]

Legal necessity may justify a mistrial. Thus, discovery by the judge that members of the jury were biased for or against one side warrants discharge and retrial.[688] Similarly, a military emergency precluding continuation of the trial justifies a mistrial.[689] In such cases, a careful review must be undertaken to determine who benefited from the mistrial. A much higher burden is imposed if the discharge is not to the defendant's benefit.[690] Thus, discharge of a jury because witnesses were not properly warned of their constitutional rights bars retrial.[691] Similarly, if a judge ends a case because of his own personal commitments,[692] or because he does not wish to resolve certain factual or legal issues,[693] retrial is barred. Neither discharge benefits the defendant.

While the Federal constitutional standard as to manifest necessity has been broadened recently, the Pennsylvania standard has been narrowed recently. In *Illinois v. Somerville*,[694] the United States Supreme Court established a new balancing test for determining manifest necessity. In weighing a defendant's right to a particular tribunal against society's interest in insuring that a guilty defendant does not go free, the Court held that the ends of public justice are not served by requiring the government to proceed when a guilty verdict would automatically be reversed by an appellate court.[695] Recent decisions of the Pennsylvania courts indicate that

687. *See* Commonwealth v. Brooks, 225 Pa. Super. 247, 309 A.2d 732 (1973); Commonwealth v. Reeves, 218 Pa. Super. 88, 272 A.2d 197 (1970) (mistrial proper; defendant refused to proceed with jury of less than twelve).

688. Simmons v. United States, 142 U.S. 148 (1891) (juror acquainted with defendant); *see also* Thompson v. United States, 155 U.S. 271 (1894) (juror previously on grand jury that had indicted defendant); United States *ex rel.* Peetros v. Rundle, 342 F. Supp. 55 (E.D. Pa. 1972) (jurors read newspaper articles).

689. Wade v. Hunter, 336 U.S. 684 (1949).

690. United States v. Jorn, 400 U.S. 470 (1971).

691. *Id.*

692. Commonwealth v. Wideman, 453 Pa. 119, 306 A.2d 894 (1973).

693. Commonwealth v. Culpepper, 221 Pa. Super. 472, 293 A.2d 122 (1972).

694. 410 U.S. 458 (1973).

695. In Illinois v. Somerville, 410 U.S. 458 (1973), after the jury was sworn, the prosecutor realized that the indictment was fatally defective. State law prevented amendment of the indictment. Mistrial, over defense counsel's objection, was held not to bar retrial.

questions as to the existence of manifest necessity must be resolved in favor of the defendant. The failure of the prosecutor to recognize his error prior to trial will bar retrial after discharge of the jury, unless the defendant or his counsel requests the dismissal.[696] In fact, the Pennsylvania Supreme Court, applying its own crminal procedural rules[697] once stated that only a defendant or his counsel may move for a mistrial. Hence a declaration by the court *sua sponte* or on request of the prosecution bars retrial.[698] However, this seemingly absolute rule has been limited in later cases[699] and it appears probable that mistrials, with a defendant's consent, or even without his consent in extraordinary fact situations, will still allow reprosecution.[700]

XIX. Autrefois Acquit and Autrefois Convict

Under the Federal Constitution[701] and Pennsylvania statutes and common law,[702] once an accused has been placed on trial in a competent court and has been acquitted or convicted, he cannot ordinarily be placed on trial again for the same offense.

A. *Autrefois Acquit*

The doctrine of *autrefois acquit* generally precludes the Commonwealth from appealing an acquittal by a competent court or retrying a defendant on the same indictment.[703] Any indication of

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696. *Compare* Commonwealth v. Ferguson, 446 Pa. 24, 285 A.2d 189 (1971) *with* Commonwealth v. Shaffer, 447 Pa. 91, 288 A.2d 727 (1972).

697. Pa. R. Crim. P. 1118(b).

698. Commonwealth v. Lauria, 450 Pa. 72, 297 A.2d 906 (1972) (the court also found no "manifest necessity" for the mistrial).

699. Commonwealth v. Brown, 451 Pa. 395, 301 A.2d 876 (1973). (Rule 1118 not applicable to hung jury situation). Commonwealth v. Stewart, Pa. , A.2d , (1974) (mistrial because of prejudice of jury member proper even over defendant's objection).

700. *See* Commonwealth v. Shaffer, 447 Pa. 91, 288 A.2d 727 (1972) (discussing "classic examples" of proper mistrials).

701. U.S. Const. amend. V. *See* Benton v. Maryland, 395 U.S. 784 (1969); Kepner v. United States, 195 U.S. 100 (1904).

702. Even prior to *Benton*, the doctrines of *autrefois acquit* and *autrefois convict* were part of Pennsylvania jurisprudence. *See* note 641 *supra*. The new Pennsylvania Crimes Code bars reprosecution if "the former prosecution resulted in an acquittal" [Pa. Stat. Ann. tit. 18, § 109(1) (Supp. 1973)] or if "the former prosecution resulted in a conviction." [Pa. Stat. Ann. tit. 18, § 109(3) (Supp. 1973)]. The Comments state that this is a codification of existing law. *See* PBA Comments at 3.

703. United States v. Sisson, 399 U.S. 267 (1970); Kepner v. United States, 195 U.S. 100 (1904); United States v. Ball, 163 U.S. 662, 676 (1896); Commonwealth v. Haines, 410 Pa. 601, 190 A.2d 118 (1963); Steinberg v. Bower, 56 Pa. 408, 27 A. 299 (1893); Commonwealth v. Zeger, 193 Pa. Super. 498, 165 A.2d 683 (1961).

Under Pennsylvania law, prior to *Benton*, the Commonwealth could appeal acquittals in cases of nuisance, forcible entry and detainer and forcible detainer and in all other cases where pure questions of law and no issues of fact are inolved. *See* Pa. Stat. Ann. tit. 19, § 1188 (1964). However, in light of *Benton*, the courts have found that a "not guilty is a not guilty" barring appeal on reprosecution after an acquittal, even if based on questions of law. *See* Commonwealth v. Rios, 447 Pa. 397, 289

a finding of not guilty or that there was reasonable doubt as to guilt invokes the protection.[704]

The doctrine does not preclude collateral actions against a defendant. Thus an acquittal of a charge will not bar a violation hearing and a subsequent revocation of probation or parole on the same facts.[705] Similarly, an acquittal of smuggling will not bar forfeiture proceedings against the allegedly smuggled goods.[706] Of course, acquittal in a criminal case will not bar a civil suit for damages.[707]

Neither does the doctrine preclude the Commonwealth from appealing from an interlocutory order suppressing or excluding evidence when the element of finality is inherent in the order.[708] Any suppression ruling which will "substantially handicap" the Commonwealth, so that the evidence suppressed may well make the difference between success and failure,[709] may be appealed.

Under ordinary circumstances, the Commonwealth may appeal from an order sustaining a demurrer.[710] However, if the judge indicates in his ruling that he is, in fact, finding "reasonable doubt," it is an acquittal, barring retrial or appeal.[711] Of course, the Com-

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A.2d 721 (1972); *cf.* Commonwealth v. Ray, 448 Pa. 307, 292 A.2d 410 (1972). In addition, the new Crimes Code, PA. STAT. ANN. tit. 18, § 109 (1) (Supp. 1973) impliedly supersedes PA. STAT. ANN. tit. 19, § 1188 (1964) by providing for an absolute bar upon acquittal.

704. *See* United States v. Sisson, 399 U.S. 267 (1970) (motion in arrest of judgment really directed verdict of acquittal); Fong Foo v. United States, 369 U.S. 141 (1962) (directed verdict of acquittal); Commonwealth v. Ray, 448 Pa. 307, 292 A.2d 410 (1972) (ordinance unconstitutional, defendant adjudged "not guilty"); Commonwealth v. Rios, 447 Pa. 397, 289 A.2d 721 (1972); Commonwealth v. Harris, 220 Pa. Super. 102, 283 A.2d 728 (1971) (magic words of "reasonable doubt"). The Crimes Code provides in PA. STAT. ANN. tit. 18, § 109(1) (Supp. 1973): "There is an acquittal if the prosecution resulted in a finding of not guilty by the trier of fact. . . ."

705. Commonwealth v. Kates, 452 Pa. 102, 305 A.2d 701 (1973).

706. One Lot Emerald Cut Stones v. United States, 409 U.S. 232 (1972).

707. *See* United States *ex rel.* Marcus v. Hess, 317 U.S. 537 (1943); Yates v. United States, 355 U.S. 66 (1957). Morch v. Raubitschek, 159 Pa. 559, 28 A. 369 (1894). Of course, the converse is also true.

708. Commonwealth v. Fisher, 422 Pa. 134, 221 A.2d 115 (1966); Commonwealth v. Warfield, 424 Pa. 505, 227 A.2d 177 (1965); Commonwealth v. Bosurgi, 411 Pa. 56, 190 A.2d 304, *cert. denied,* 375 U.S. 910 (1963); Commonwealth v. Smith, 212 Pa. Super. 403, 244 A.2d 787 (1968).

709. *See* Commonwealth v. Warfield, 424 Pa. 505, 227 A.2d 177 (1967); Commonwealth v. Smith, 212 Pa. Super. 403, 405-06, 244 A.2d 787, 788 (1968). For the same principle in federal law, *see* Kepner v. United States, 195 U.S. 100 (1904); Di Bella v. United States, 369 U.S. 121 (1962); 18 U.S.C. §§ 1404, 3731 (1969).

710. Commonwealth v. Mason, 211 Pa. Super. 328, 236 A.2d 548 (1967).

711. Commonwealth v. Harris, 220 Pa. Super. 102, 283 A.2d 728 (1971).

monwealth can only appeal from the demurrer and, if successful on appeal, then retry. It cannot immediately proceed to a new prosecution.[712]

B. *Autrefois Convict*

While conviction bars retrial on the same charge,[713] it has long been established that the double jeopardy clause does not preclude retrial of a defendant whose conviction has been set aside because of an error in the original proceedings.[714] The theory is that, when a defendant secures a new trial either through post-trial motions, an appeal, or post-conviction proceedings, he waives the benefit of the double jeopardy provision.[715] Thus, reversal because of a defective indictment does not bar retrial on a new and proper one.[716] Similarly, reversal because of improper prosecutorial actions does not bar retrial.[717]

C. *Implied Acquittal*

Included with the concepts of *autrefois acquit* or *convict* is the doctrine of implied or implicit acquittal. If a defendant is brought

712. The new Crimes Code, PA. STAT. ANN. tit. 18, § 109(1) (Supp. 1973) bars reprosecution if there is "a determination that there was insufficient evidence to warrant a conviction." Because the standard is for a "conviction," a final order, either unappealed or after appeal, that assuming all facts in favor of the Commonwealth no reasonable jury could find a defendant guilty beyond a reasonable doubt, would bar retrial. In addition PA. STAT. ANN. tit. 18, § 109(2) (Supp. 1973) bars retrial if a prosecution is "terminated . . . by a final order or judgment for the defendant, which has not been set aside, reversed or vacated and which necessarily required a determination inconsistent with a fact . . . that must be established for conviction of the offense." The Comments provide that under this section any final order would bar subsequent prosecution. See P.B.A. Comments at 3; *see also* M.P.C. Comments at 49-51.

713. *See* PA. STAT. ANN. tit. 19, § 464 (1964); Commonwealth v. Balles, 163 Pa. Super. 467, 62 A.2d 91 (1948). *See also* PA. STAT. ANN. tit. 18, § 109(3) (Supp. 1973) (barring reprosecution if "the former prosecution resulted in a conviction.")

714. North Carolina v. Pearce, 395 U.S. 711 (1969); United States v. Tateo, 377 U.S. 463 (1964); Hill v. Texas, 316 U.S. 400 (1942); United States v. Ball, 163 U.S. 662 (1896); Commonwealth v. Thomas, 448 Pa. 42, 292 A.2d 352 (1972).

The new Crimes Code, PA. STAT. ANN. tit. 18, § 109(3) (Supp. 1973) limits the double jeopardy bar for convictions which have not been reversed or vacated. PA. STAT. ANN. tit. 18, § 112(3) (Supp. 1973) limits the bar further to judgments of convictions which were not held invalid in a subsequent proceeding on a writ of habeas corpus, coram nobis or similar process.

715. Forman v. United States, 361 U.S. 416 (1960); Bryan v. United States, 338 U.S. 552 (1950); United States *ex rel.* Slebodnik v. Pennsylvania, 343 F.2d 605 (3d Cir. 1965); Commonwealth v. Thomas, 448 Pa. 42, 292 A.2d 352 (1972); Commonwealth *ex rel.* Farrow v. Martin, 387 Pa. 449, 127 A.2d 660 (1956), *cert. denied*, 353 U.S. 986 (1957).

716. United States v. Beard, 414 F.2d 1014 (3d Cir. 1969); *see* Eubanks v. Louisiana, 356 U.S. 584 (1958).

717. *See, e.g.*, Commonwealth v. Potter, 445 Pa. 284, 285 A.2d 492 (1971).

to trial on several charges and is acquitted of some and convicted of others, he may not be retried on those charges of which he was acquitted, even if he secures a new trial on the charges of which he was convicted.[718]

Similarly, where a crime is included in and forms a necessary part of another, and is but a different degree of the same crime, a conviction or acquittal of the *higher* crime will bar prosecution for any lesser crime which is an essential element or ingredient.[719] Thus, if one is convicted of manslaughter or second degree murder, he cannot be tried on retrial for any higher degree of homicide.[720] Similarly, conviction of an attempt to commit an offense bars subsequent prosecution for the substantive offense itself.[721]

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718. Benton v. Maryland, 395 U.S. 784 (1969); Price v. Georgia, 398 U.S. 323 (1970) (defendant convicted of involuntary manslaughter; although second conviction for involuntary manslaughter, trial on other charges improper and new trial ordered); Commonwealth v. Day, 114 Pa. Super. 511, 174 A. 646 (1934).

719. Green v. United States, 356 U.S. 65 (1957); Commonwealth *ex rel.* Papy v. Maroney, 417 Pa. 366, 207 A.2d 814 (1965); Commonwealth v. Thatcher, 364 Pa. 326, 71 A.2d 796 (1950); Commonwealth *ex rel.* Maszczynski v. Ashe, 343 Pa. 102, 228 A.2d 30 (1941); Commonwealth v. Cox, 209 Pa. Super. 457 (1967). The rationale is that if the original indictment contained the higher degree, a conviction of the lower degree is in fact an acquittal of the higher or if the original indictment only contained the lesser offense, the Commonwealth, having elected to prosecute for the lesser, is thereafter estopped from prosecuting for the greater. Comment, 19 U. PITT. L. REV. 630, 643 (1958). The new Crimes Code provides that "a finding of guilty of a lesser included offense is an acquittal of the greater included offense, although the conviction is subsequently set aside. "The Comments provide this is a codification of existing law. PA. STAT. ANN. tit. 18, § 109(1) (Supp. 1973). P.B.A. Comments at 3. *See also* PA. STAT. ANN. tit. 19, § 831 (1964) *supra* note 641, which provides *inter alia* that if a person is tried for a misdemeanor and the same facts amount to a felony, he may not be later prosecuted for the felony. *See* Commonwealth v. Arner, 149 Pa. 35, 24 A. 83 (1892).

A troublesome problem occurs with guilty pleas that are later vacated. Some courts have held that subsequent trial on the higher offense is barred. Others have held it is not. *See* Mullreed v. Kropp, 425 F.2d 1095 (6th Cir. 1970); Ward v. Page, 424 F.2d 491 (10th Cir. 1970); United States *ex rel.* Metz v. Maroney, 404 F.2d 233 (3d Cir.), *cert. denied*, 394 U.S. 94 (1968); United States v. Freije, 282 F. Supp. 997 (D.N.H. 1968); People v. Harper, 32 Mich. App. 73, 188 N.W.2d 254 (1971). The new Crimes Code does not appear to make any distinctions between "implied acquittals" for reversals after pleas or verdicts. *See* PA. STAT. ANN. tit. 18, § 109(1) (Supp. 1973).

720. Price v. Georgia, 398 U.S. 323 (1970); Green v. United States, 356 U.S. 65 (1957); Commonwealth v. Frazier, 420 Pa. 209, 216 A.2d 387 (1966); Commonwealth *ex rel.* Light v. Cavell, 422 Pa. 215, 220 A.2d 883 (1966); Commonwealth v. Jordan, 328 Pa. 439, 196 A. 10 (1938).

721. Commonwealth v. McCusker, 363 Pa. 450, 70 A.2d 273 (1950); Commonwealth *ex rel.* Shaddick v. Ashe, 340 Pa. 286, 17 A.2d 190 (1940).

However, there is an implied acquittal only if one could have been convicted of the lesser offense within the indictment charging the greater.[722]

Of course, if one is acquitted of the lower degree of a crime, he is thereby acquitted of all higher degrees as well.[723]

D. *Competent Court*

The basic requirement for any plea of double jeopardy based on the doctrine of *autrefois acquit* or *convict* is that the defendant has been tried in a competent court for the same offense.[724] Thus, if the court hearing the case was not competent, the state may retry the defendant. For example, where a coroner's jury recommended a judgment of manslaughter, this did not preclude a trial and conviction for murder, as the coroner's jury did not have the power to decide guilt or innocence.[725] Similarly, where the court of one county lacked jurisdiction to try a defendant on a charge, the acquittal in that county is a nullity and retrial is not barred.[726] Jeopardy does not attach where the court hearing the case did not have jurisdiction over the parties or subject[727] or if the original conviction or acquittal was secured by fraud.[728]

Under the new Crimes Code,[729] the requirement of a trial by a competent court and without fraud has been preserved. In order to insure protection to the state, reprosecution is not barred when there is no jurisdiction[730] or where a former prosecution is procured by a defendant without notice to the appropriate prosecuting officer.[731]

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722. A. Cortese, *Former Jeopardy and the Special Pleas in Bar*, 25 TEMPLE L.Q. 170, 173 (1951). Thus for example, an acquittal for rape would bar subsequent prosecution for fornication because under the indictment for rape, the defendant could have been convicted of fornication. However, if one engages in robbery, and while in the act of robbery he also perpetrates arson, the crimes do not merge. 15 U. PITT. L. REV. 505, 506 (1954). *See also* Commonwealth v. Exler, 61 Pa. Super. 423 (1915) (murder and statutory rape not merged).

These rules have been changed substantially by the new compulsory joinder provisions of the new Crimes Code. *See* PA. STAT. ANN. tit. 18, § 110 (Supp. 1973). See notes 116-127 and accompanying text *supra*.

723. Commonwealth v. Thatcher, 364 Pa. 326, 71 A.2d 796 (1950).

724. *See* M.P.C. Comments at 64; Grafton v. United States, 206 U.S. 333 (1907).

725. Commonwealth *ex rel.* Wilkes v. Maroney, 423 Pa. 113, 222 A.2d 856 (1966).

726. Commonwealth v. Simeone, 222 Pa. Super. 376, 294 A.2d 921 (1972).

727. Johnson v. United States, 41 F.2d 44 (9th Cir.), *cert. denied*, 282 U.S. 864 (1930); United States v. Ball, 163 U.S. 662, 669 (1896).

728. Commonwealth v. Bolton, 14 Del. 85, (Pa. Q.S. 1915); *but cf.* Commonwealth v. Kroekel, 121 Pa. Super. 423, 183 A. 749 (1936).

729. PA. STAT. ANN. tit. 18, §§ 112(1), 112(2) (Supp. 1973).

730. The Comments repeat that this is in accord with existing law. P.B.A. Comments at 4. The Model Penal Code Commentary states that this is the rule for "all courts." M.P.C. Comments at 64.

731. The Comments state that this "clarifies existing law" as indicated by the conflict of *Bolton* and *Kroekel* (cited in note 727 *supra*). The re-

E. *Subsequent Events*

Double jeopardy does not apply to any event subsequent to the original indictment.[732] Thus a prosecution for an offense which is a continuing one is a bar to subsequent prosecution for the same offense charged to have been committed at any time previous to the institution of the first prosecution but is not a bar to a prosecution for the same offense if committed subsequent to that time.[733] Similarly, if one is indicted, tried and convicted of a crime involving the *injury* of another, and the victim later *dies*, the defendant could be properly indicted and convicted of murder.[734]

While not required by the Federal Constitution, Pennsylvania law, both by case law[735] and statute[736] now would nullify a second trial if all the acts up to trial time, whether precedent or subsequent to indictment, are not tried together.

XX. Successive Prosecutions of the Same Criminal Transaction

Prior to the new Crimes Code and recent decisions on criminal collateral estoppel, successive prosecutions for different crimes arising out of the same criminal transaction were not barred unless the offenses "merged"; that is, unless one was an included offense of the other.[737] If one were a lesser included offense of the other,

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quirement of knowledge to the prosecutor is to assure no fraud and "rests upon the assumption that the state is adequately protected if the proper attorney for the prosecution has notice of the proceeding." *See* M.P.C. Comments at 65.

732. Commonwealth v. Campbell, 22 Pa. Super. 98 (1903).

733. Commonwealth v. Kwiatkowski, 89 Pa. Super. 272 (1926).

734. Commonwealth *ex rel.* Papy v. Maroney, 417 Pa. 368, 207 A.2d 814 (1965); Commonwealth v. Ramunno, 219 Pa. 204, 68 A. 184 (1907).

735. Commonwealth v. Campana, 452 Pa. 233, 304 A.2d 432 (1973).

736. Pa. Stat. Ann., tit. 18, § 110(1)(ii) (Supp. 1973). Both the new Crimes Code provision and *Campana* are based on the Model Penal Code provision 1.09. The Commentary indicates the intent of the drafters to limit reprosecution for any event known and consummated at the time of the previous prosecution. *See* M.P.C. Comments at 57.

737. *See Commonwealth v. Leib*, 76 Pa. Super. 413 (1921); Commonwealth v. Comber, 374 Pa. 570, 97 A.2d 343 (1953). The historic test in Pennsylvania was "whether the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction upon the first. . . ." Commonwealth v. Comber, 374 Pa. 575, 97 A.2d 343 (1953); Heickes v. Commonwealth, 26 Pa. 513, 515 (1856). The first step is to determine whether a given set of facts gives rise to more than one offense. If it does, the second offense is separate if the evidence with which the Commonwealth could secure a first conviction would be insufficient to secure a separate conviction for the second offense. Commonwealth v. Shoener, 30 Pa. Super. 321, *aff'd*, 216 Pa. 71, 61 A. 1093 (1906), *aff'd*, 207 U.S. 188 (1907). In other words, if the offenses are distinct and separate, the

reprosecution would be barred under the implied acquittal doctrine described above.[738] Similarly, as there could not be an invasion of the deliberations of the fact-finder, no examination would be made as to what facts were determined in a prior prosecution, even an acquittal.[739] Thus, if different evidentiary questions were involved, the fact that two or more charges related to and grew out of one transaction did not give rise to a jeopardy bar.[740] Whether a single act or series of acts constituted two or more separate offenses was determined by whether each offense required proof of additional facts.[741]

These tests have been changed by the adoption of the Federal constitutional doctrine of criminal collateral estoppel by the United States Supreme Court in *Asle v. Swenson*[742] and by the adoption of the requirements of compulsory joinder by this Commonwealth as a judicial and statutory principle.[743] The "nebulous law of merger"[744] is now applicable only to sentencing criteria.[745]

A. *Criminal Collateral Estoppel*

The doctrine of *res judicata* includes the concept of collateral estoppel and is now applicable to all criminal cases. If the fact finder makes a determination of fact necessarily inconsistent with

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outcome of a trial of the prosecution of one had no bearing on the subsequent prosecution of the other. *See* Commonwealth v. Comber, 374 Pa. 570, 97 A.2d 343 (1953).

738. *See* notes 718-23 and accompanying text *supra*.

739. *See* Ciucci v. Illinois, 356 U.S. 571 (1958) (successive prosecution after conviction); Hoag v. New Jersey, 356 U.S. 464 (1958) (successive prosecution after acquittal).

740. Commonwealth *ex rel.* Garland v. Ashe, 344 Pa. 407, 26 A.2d 190 (1942); Commonwealth v. Dunnick, 204 Pa. Super. 58, 202 A.2d 542 (1964).

741. Blockburger v. United States, 284 U.S. 299 (1932); Gavieres v. United States, 220 U.S. 338, 342 (1911); Commonwealth v. Cox, 209 Pa. Super. 457, 228 A.2d 30 (1967). Thus if it is alleged that a defendant has robbed or murdered different individuals in the same transaction, he may be tried separately for each as each prosecution involved a distinct fact—the identity of the victim. *See* Ciucci v. Illinois, 356 U.S. 571 (1958); Hoag v. New Jersey, 356 U.S. 464 (1958); Commonwealth v. Melissa, 298 Pa. 63, 148 A. 45 (1929); Commonwealth *ex rel.* Lockhart v. Myers, 193 Pa. Super. 531, 165 A.2d 400 (1960), *cert. denied*, 368 U.S. 860 (1961). Similarly, a person may be tried separately for the distinct offenses of possession, use and sale of narcotics. Gore v. United States, 357 U.S. 387 (1958) or he may be tried separately for a substantive crime and conspiracy. Pinkerton v. United States, 328 U.S. 640 (1948); United States v. Bayer, 331 U.S. 532 (1947).

742. 397 U.S. 436 (1970).

743. *See* Commonwealth v. Campana, 452 Pa. 233, 304 A.2d 432 (1973); PA. STAT. ANN. tit. 18, § 110 (Supp. 1973). In *Campana*, the Pennsylvania Supreme Court based its decision on "constitutional grounds." The United States Supreme Court has remanded, 414 U.S. 808 (1973) for a determination as to whether it is based on state or federal constitutional grounds. On remand, the court held its decision was based on independent state grounds. Commonwealth v. Campana, Pa. , A.2d (1974).

744. *See* P.B.A. Comments at 3.

745. *See* Commonwealth v. Hill, 453 Pa. 349, 310 A.2d 88 (1973); Commonwealth v. Nelson, 452 Pa. 275, 305 A.2d 369 (1973); Commonwealth v. Smith, 452 Pa. 1, 304 A.2d 456 (1973).

that required for a second prosecution, the second prosecution is barred.[746] Whether an issue has been litigated is determined by an examination of the record to see if a rational jury could have based its verdict on an issue other than that which the defendant now seeks to foreclose.[747] Of course, because only an acquittal would show a finding beneficial to a defendant, collateral estoppel is not applicable to successive prosecution after a guilty verdict.[748] However, a conviction of an included offense would bar successive prosecution for a more severe offense, under the implied acquittal and collateral estoppel doctrines.[749] The collateral estoppel doctrine is now statutorily prescribed.[750]

B. *Compulsory Joinder*

Although compulsory joinder is not required by the Federal Constitution,[751] the Pennsylvania Supreme Court and the new Crimes Code have adopted the Model Penal Code[752] requirement that all known charges against a defendant arising from the same criminal episode must be tried at one time.[753] Even if different evidence supports the charges and even if different distinct acts are involved, if the charges derive from the same criminal event, one and only one prosecution is permissible.[754]

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746. Ashe v. Swenson, 397 U.S. 436 (1970).

747. Turner v. Arkansas, 407 U.S. 366 (1972) (successive prosecution for murder and then robbery barred; only issue was whether defendant was one of the robbers); Harris v. Washington, 404 U.S. 55 (1971); Simpson v. Florida, 403 U.S. 384 (1971) (successive prosecutions for robbery of store manager and customer barred; only issue identity of perpetrator); Ashe v. Swenson, 397 U.S. 436 (1970) (robbery of poker players; acquittal based on failure to identify defendant; successive trial barred); Commonwealth v. Dooley 225 Pa. Super. 454, 310 A.2d 690 (1973) (acquittal of arson murder; reprosecution of arson barred); Commonwealth v. De Vaughn, 221 Pa. Super. 410, 292 A.2d 444 (1972) (same-collateral estoppel must be looked at "realistically").

748. Of course, requirements of compulsory joinder may bar successive prosecution here. *See* notes 751-762 and accompanying text *infra*.

749. *See* Waller v. Florida, 397 U.S. 387 (1970); *see also* notes 718-723 and accompanying text *supra*.

750. PA. STAT. ANN. tit. 18, § 110(2) (Supp. 1973) precludes a subsequent prosecution if a prior trial was terminated by an acquittal which "necessarily required a determination inconsistent with a fact which must be established for conviction of the second offense." *See* M.P.C. Comments at 58-59.

751. *See, e.g.*, Robinson v. Neil, 410 U.S. 959 (1973).

752. MODEL PENAL CODE § 1.09 (Proposed Official Draft 1962). *See* PBA Comments at 3.

753. Commonwealth v. Campana, 452 Pa. 233, 304 A.2d 432 (1973); PA. STAT. ANN., tit. 18, § 109 (Supp. 1973).

754. Commonwealth v. Campana, 452 Pa. 233, 304 A.2d 432 (1973).

While there appears to be some confusion as to overlapping sections of the Crimes Code provision,[755] it appears that the same transaction standard is not applicable where an offense is not known to the appropriate prosecuting officer,[756] where one single court does not have jurisdiction over all the charges,[757] or where the court orders a separate trial of various charges,[758] or where the second offense was not consummated at the time of the former trial.[759]

Included within the bar to successive prosecution is the former jeopardy requirement.[760] Thus, prosecution on related offenses is barred if a previous prosecution was "improperly terminated" and the subsequent prosecution is for an offense which could have been tried at the first trial.[761]

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755. PA. STAT. ANN. tit. 18, § 110(1)(ii) (Supp. 1973) precludes a subsequent prosecution for any offense "*based on the same* conduct or arising from the same criminal episode. . . ." A later subsection bars reprosecution for "the *same conduct* unless" the prior prosecution (1) involved proof of different facts and is for a crime intended to prevent a substantially different harm or evil. *Id.* at § 110(1)(iii). The dual use of the term "same conduct" first without exceptions and then with exceptions is obviously a mistake. It is based on the Crimes Code drafters adopting portions of the Model Penal Code sections on compulsory joinder and on limitations of subsequent prosecutions for different offenses. Compare M.P.C. § 1.08 and 1.10 at 29, 55. The Commentary to those sections clarifies the problem. The second description of the same conduct was devised to apply only where the compulsory joinder provision did not operate. See M.P.C. Comments at 57. Commonwealth v. Campana, 452 Pa. 233, 304 A.2d 432 (1973), adopting the Model Penal Code provisions, clarifies its application.

756. PA. STAT. ANN. tit. 18, §§ 110(1)(ii), 112(2) (Supp. 1973). This would include cases where subsequent events occur after trial on the former prosecution. *See* notes 732-36 and accompanying text *supra*. It would also include events hidden from the prosecutor. *See* M.P.C. Comments at 56-57.

757. PA. STAT. ANN. tit. 18, §§ 110(1)(ii), 112(i) (Supp. 1973). *See* Commonwealth v. Simeone, 222 Pa. Super. 376, 294 A.2d 921 (1972). Difficult problems arise where more than one court tries criminal cases in a jurisdiction. Under *Campana*, if a defendant is tried for a summary offense before a justice of the peace and acquitted, he may not later be tried for assault. Protection is afforded by requiring such prosecutions to be known to the prosecutor. PA. STAT. ANN. tit. 18, § 112(2) (Supp. 1973). *See* M.P.C. Comments at 65. Thus, a conviction and fine or acquittal for a traffic violation such as reckless driving, with no prosecutor present, and without his knowledge, would not bar trial for the misdemeanor of driving while intoxicated. *Compare* Waller v. Florida, 397 U.S. 387 (1970) (city-state prosecutions and collateral estoppel-double jeopardy bar).

758. PA. STAT. ANN. tit. 18, § 110(1)(ii) (Supp. 1973). A court-ordered separate trial must, of course, be based on recognized factors and considerations. Such an order, over the defendant's objection, might be later held to have been improper and thus a bar to subsequent prosecution. *See* M.P.C. Comments at 39-41.

759. PA. STAT. ANN. tit. 18, § 110. This is similar to the "known to the appropriate prosecuting officer" provision. *See* note 756 *supra*.

760. *See* notes 651-700 and accompanying text *supra*.

761. PA. STAT. ANN. tit. 18, § 110(3) (Supp. 1973). The Crimes Code specifically refers to the same standards adopted, barring reprosecution for same offense in PA. STAT. ANN., tit. 18, § 109(4) (Supp. 1973).

If a defendant appeals a conviction and secures a reversal, the state is free to try him on all charges arising out of the transaction, unless there has been an implied acquittal of an included offense.[762]

XXI. Successive Prosecutions in Different Jurisdictions

Under federal constitutional law, it is clear that separate prosecutions in different jurisdictions for the same criminal episode are proper.[763] However, the "dual sovereignty" doctrine does not extend to permit successive municipal and state prosecutions.[764]

As a matter of state law, the Pennsylvania Supreme Court has adopted a prospective rule prohibiting Pennsylvania prosecution of an offense previously tried in another jurisdiction.[765] The only exceptions to the rule permit Pennsylvania prosecution if the interests of the other jurisdiction were substantially different from that of Pennsylvania or the interests of the Commonwealth were not sufficiently protected in the initial prosecution.[766]

The new Crimes Code[767] adopts this standard by precluding a subsequent prosecution unless "the law defining each of such offenses is intended to prevent a substantially different harm or evil."[768] The doctrine of collateral estoppel is also applied by the Crimes Code.[769] The requirements of compulsory joinder[770] and former jeopardy[771] are not applied. Of course, such a prior prose-

762. *See* M.P.C. Comments at 49.

763. Abbate v. United States, 359 U.S. 187 (1959) (state, federal); Bartkus v. Illinois, 359 U.S. 121 (1959) (federal, state); Commonwealth v. Taylor, 193 Pa. Super. 360, 165 A.2d 390 (1960) (federal, state). *See* Nielson v. Oregon, 212 U.S. 315 (1909). Shortly after *Abbate*, the then Attorney General Rogers indicated that with cooperation between federal and state authorities, "consideration of a second prosecution should seldom arise." N.Y. Times, April 6, 1959, at 1, col. 4, *quoted in* L. Hall, Y. Kamisar, W. LaFave, and J. Israel, Modern Criminal Procedure 1213 (3d ed. 1969).

764. Waller v. Florida, 397 U.S. 387 (1970).

765. Commonwealth v. Mills, 447 Pa. 163, 286 A.2d 638 (1971).

766. *Id.*

767. Pa. Stat. Ann. tit. 18, § 111 (Supp. 1973). The Comment notes: "there is no logical reason why an acquittal or conviction of the same crime in another jurisdiction should not be as conclusive as within the same jurisdiction." PBA Comments at 4.

768. Pa. Stat. Ann. tit. 18, § 111(1)(i) (Supp. 1973).

769. Pa. Stat. Ann. tit. 18, § 111(2) (Supp. 1973); *See* M.P.C. Comments at 63.

770. *See* M.P.C. Comments at 60. *Compare* Pa. Stat. Ann., tit. 18, § 110 (Supp. 1973). The section does preclude subsequent prosecution for the "same conduct."

771. Pa. Stat. Ann. tit. 18, § 111 (Supp. 1973) refers to the concepts of acquittal and conviction included in § 109. No mention is made of "improper termination" found in §§ 109 or 110.

cution had to be known to the prosecuting officer in this Commonwealth[772] and has to be final.[773]

XXII. Multiple or Increased Punishment

The federal constitutional guarantee against double jeopardy protects against multiple punishments for the same offense.[774] After judgment has been rendered and sentence executed, a convicted defendant cannot be sentenced on that conviction to another and different punishment.[775] The multiple or increased punishment prohibition precludes an increase of sentence to correct factual or legal mistakes[776] and limits sentence changes after retrial.[777]

A. *Modification of Sentence*

Federal law has long precluded a court from increasing a sentence in any way, once it was executed.[778] However, various states, including Pennsylvania, had statutes allowing sentences to be vacated, amended, or increased within a set period after imposition.[779]

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772. *See* Pa. Stat. Ann. tit. 18, § 112(2) (Supp. 1973). An additional requirement of a "purpose of avoiding the sentence which might otherwise be imposed" is found in this provision.

773. *See* Pa. Stat. Ann. tit. 18, § 109(3), 112(3) (Supp. 1973).

774. North Carolina v. Pearce, 395 U.S. 711 (1969). In addition, the common law doctrine of merger, still applicable in Pennsylvania for the purposes of sentencing, protects against multiple punishment for crimes that necessarily involve each other. Commonwealth *ex rel.* Maszczrynski v. Ashe, 343 Pa. 102, 21 A.2d 920 (1941). Thus, resisting arrest and assault and battery on a police officer are proven by the same evidence and they merge for sentencing purposes. Commonwealth v. Nelson, 452 Pa. 275, 305 A.2d 369 (1973). *See* Commonwealth v. Walker, 219 Pa. Super. 167, 280 A.2d 590 (1971) (carrying firearm in car and carrying firearm on person). But robbery and murder do not merge and separate concurrent sentences for each after a felony-murder conviction is lawful. Commonwealth v. Smith, 452 Pa. 1, 304 A.2d 456 (1973). Clearly, separate murders in the same incident may be punished separately. Commonwealth v. Hill, 453 Pa. 349, 310 A.2d 88 (1973).

775. *Ex parte* Lange, 85 U.S. (18 Wall.) 163 (1873).

776. Commonwealth v. Silverman, 442 Pa. 211, 275 A.2d 308 (1971); Commonwealth v. Thomas, 219 Pa. Super. 22, 280 A.2d 651 (1971).

777. Odom v. United States, 400 U.S. 23 (1970); Commonwealth v. Gaito, 223 Pa. Super. 564, 302 A.2d 390 (1973).

778. United States v. Benz, 282 U.S. 304 (1931); United States v. Murray, 275 U.S. 347 (1928); *Ex parte* Lange, 85 U.S. (18 Wall.) 163 (1873); United States v. Sacco, 367 F.2d 368 (2d Cir. 1966); Tatum v. United States, 310 F.2d 856 (D.C. Cir. 1962). Some argued that the federal doctrine was based on the lack of jurisdiction and statutory power to increase sentence. *See* Acme Poultry Corp. v. United States, 146 F.2d 738, 739 (4th Cir. 1944).

779. Pa. Stat. Ann. tit. 12, § 1032 (1969). There could be no claim that Pennsylvania courts, given authority specifically by statute, did not have the power or jurisdiction to increase sentence. *See* United States *ex rel.* Jones v. Pennsylvania, 218 F. Supp. 689 (W.D. Pa. 1963); Commonwealth *ex rel.* Gaynor v. Maroney, 199 Pa. Super. 81, 184 A.2d 409 (1962). The only requirement might have been that if a second harsher sentence was imposed, adequate reasons had to be apparent on the record. United

In addition, some states had provisions allowing sentencing panels or appellate courts to review and, if desired, increase sentences.[780] Despite the fact that other courts have held such proceedings not to be in violation of the double jeopardy clause,[781] the Pennsylvania Supreme Court has held the Pennsylvania statute unconstitutional and has prohibited any modification of a sentence that can be considered an increase of punishment.[782] The rule is retroactive.[783]

This restriction on increase of sentence has been applied strictly. Clearly, even if later acts merit an increased sentence, no increase in punishment may be imposed.[784] In addition, sentencing on any one charge cannot be increased, even if the overall "punishment" for all the charges in a transaction is reduced.[785] A judge may not correct upwards an illegal sentence,[786] or correct upwards an improperly recorded sentence so as to conform with a judge's true intentions.[787]

Probation is a sentence and cannot be increased or changed to a prison term unless there has been a probation violation.[788] Once there is a violation, however, a new prison sentence may be imposed up to the maximum allowable at the time of original sentencing.[789] Of course, a suspended sentence, unlike a probationary sentence, cannot be changed.[790]

States *ex rel.* Wirtz v. Rundle, 281 F. Supp. 85, 89 (E.D. Pa. 1968). *See* Commonwealth *ex rel.* Billman v. Burke, 74 F. Supp. 846, 848 (E.D. Pa. 1947), *aff'd*, 170 F.2d 413 (3d Cir. 1948).

780. CONN. GEN. STAT. ANN. §§ 51-194 to 51-197 (1965); MASS. GEN. LAWS ANN. ch. 278, §§ 28 A-D (1965).

781. *See, e.g.*, Robinson v. Warden, 455 F.2d 1172 (4th Cir. 1972).

782. Commonwealth v. Silverman, 442 Pa. 211, 275 A.2d 308 (1971). Of course, a sentence can still be decreased within the thirty day period. *See* United States v. Benz, 282 U.S. 304 (1931).

783. Commonwealth v. Richbourg, 442 Pa. 147, 275 A.2d 345 (1971). *See, e.g.*, Commonwealth v. Jackson, 220 Pa. Super. 395, 281 A.2d 740 (1971).

784. Commonwealth v. Scrivens, 448 Pa. 60, 292 A.2d 313 (1972); Commonwealth v. Lemley, 218 Pa. Super. 350, 280 A.2d 429 (1971).

785. Commonwealth v. Phelps, 219 Pa. Super. 107, 280 A.2d 592 (1971).

786. Commonwealth v. Young, 223 Pa. Super. 447, 302 A.2d 402 (1973); Commonwealth v. Hermankevich, 220 Pa. Super. 197, 286 A.2d 644 (1971); Commonwealth v. Jackson, 218 Pa. Super. 357, 280 A.2d 422 (1971).

787. Commonwealth v. Jackson, 220 Pa. Super. 395, 281 A.2d 740 (1971); Commonwealth v. Phelps, 219 Pa. Super. 107, 280 A.2d 592 (1971); Commonwealth v. Thomas, 219 Pa. Super. 22, 280 A.2d 651 (1971).

788. Commonwealth v. Jackson, 218 Pa. Super. 357, 280 A.2d 422 (1971); *In re* Moore, 217 Pa. Super. 206, 269 A.2d 395 (1970).

789. Commonwealth v. Cole, 222 Pa. Super. 229, 294 A.2d 824 (1972); Commonwealth v. Johnson, 222 Pa. Super. 233, 294 A.2d 778 (1972).

790. Commonwealth v. Davy, 218 Pa. Super. 355, 280 A.2d 407 (1971); Commonwealth v. Young, 223 Pa. Super. 447, 302 A.2d 402 (1973); Commonwealth v. Phelps, 219 Pa. Super. 107, 280 A.2d 592 (1971); Commonwealth v. Thomas, 219 Pa. Super. 22, 280 A.2d 651 (1971).

Changing the nature of a sentence is improper, if the effect of the change is to increase the sentence. Thus, where a fine or restitution is improperly imposed, no new jail sentence can be imposed and only the illegal condition or type of sentence can be stricken or modified.[791] Similarly, changing a sentencing from concurrent to consecutive is a prohibited increase.[792] Thus, as sentences at the same time are presumed to be concurrent, unless otherwise stated, a later declaration that they are consecutive is in violation of the double jeopardy clause.[793]

B. *Increase On Appeal*

There is no double jeopardy bar to imposing whatever sentence the law allows for the offense upon reconviction after appeal.[794] However, as there is a potentially chilling effect on the right of appeal if a defendant is in danger of receiving a higher sentence, the due process clauses of the Fifth and Fourteenth Amendments of the United States Constitution require that a judge's reasons for a higher sentence must appear on the record and be based on "objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing."[795] Merely stating that the judge disapproved of a defendant's "manner and demeanor and conduct prior to and during the trial" is insufficient.[796] Conduct occurring prior to original sentence, even if not finalized then, is insufficient.[797] Objective acts, such as an escape attempt or an assault, are sufficient.[798]

If no such identifiable conduct is existent or noted, sentence may not be increased on any of the charges.[799] Even if the overall punishment for a criminal incident is lowerd or kept the same, an increased sentence on any charge is impermissible.[800]

The Pennsylvania rule is stricter than the Federal requirements. While not required by the Constitution,[801] resentencing in Penn-

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791. *See, e.g.,* Commonwealth v. Jackson, 218 Pa. Super. 357, 280 A.2d 422 (1971).
792. Commonwealth v. Hermankevich, 220 Pa. Super. 197, 286 A.2d 644 (1971).
793. Commonwealth v. Pristas, 222 Pa. Super. 254, 295 A.2d 114 (1972).
794. North Carolina v. Pearce, 395 U.S. 711 (1969).
795. Odom v. United States, 400 U.S. 23 (1970); Moon v. Maryland, 398 U.S. 319 (1970); North Carolina v. Pearce, 395 U.S. 711 (1969); Commonwealth v. Allen, 443 Pa. 96, 277 A.2d 803 (1971).
796. Commonwealth v. Gaito, 223 Pa. Super. 564, 302 A.2d 390 (1973).
797. Commonwealth v. Werner, 444 Pa. 458, 282 A.2d 258 (1971).
798. Commonwealth v. Sinwell, 223 Pa. Super. 544, 302 A.2d 400 (1973).
799. Commonwealth v. Allen, 443 Pa. 96, 277 A.2d 803 (1971).
800. Commonwealth v. Pearson, 450 Pa. 467, 303 A.2d 481 (1973); Commonwealth v. Allen, 443 Pa. 96, 277 A.2d 803 (1971).
801. *See, e.g.,* United States *ex rel.* Williams v. McMann, 436 F.2d 103 (2d Cir. 1970), *cert. denied,* 402 U.S. 914 (1971).

sylvania after a retrial pursuant to a vacated guilty plea must comply with the "identifiable conduct after first sentence" standard.[802] Again, even though retroactivity is not required by the Consitution,[803] the due process requirements for increased sentencing upon reconviction have been made retroactive in Pennsylvania, so as to require the present filing of reasons and then a review.[804]

A more difficult problem arises in cases where a trial *de novo* is sought after conviction in Municipal Court or from a summary proceeding before a justice of the peace. In 1971, the Pennsylvania Superior Court held[805] that, to preserve the right to appeal, no increase in sentence would be allowed on a trial *de novo* unless reasons relating to identifiable conduct after the lower court sentencing appear on the record. In 1972, the United States Supreme Court held that this standard is not a constitutional requisite to trials *de novo* as the slate is wiped clean and the new trial represents a completely fresh determination of the facts.[806] Similarly, Pennsylvania courts have recently held that "identifiable reasons" are no longer required for sentences on trial *de novo*.[807]

Whether or not an increased sentence is given after retrial, full credit must be given for time previously served on the offense.[808]

C. *Collateral Sentencing Consequences*

Certain sentencing procedures clearly do not violate the double jeopardy clause. For example, revocation of probation or parole after a technical violation or a new offense and sentencing a defendant to prison for the remainder of his original sen-

802. Commonwealth v. Moore, 225 Pa. Super. 264, 302 A.2d 396 (1973).
803. Michigan v. Payne, 412 U.S. 47 (1973).
804. Commonwealth v. Allen, 442 Pa. 96, 277 A.2d 803 (1971).
805. Commonwealth v. Harper, 219 Pa. Super. 100, 280 A.2d 637 (1971); Commonwealth v. Mirra. 220 Pa. Super. 393, 281 A.2d 733 (1971).
806. Colten v. Kentucky, 407 U.S. 104 (1972).
807. Commonwealth v. Moore and Battle, 226 Pa. Super. 56, 312 A.2d 422 (1973). One judge suggested in a separate concurrence, *Id.* at 65, 312 A.2d at 425, that to avoid the threat of vindictive sentencing on retrial, the sentence should not be revealed to the common pleas court judge unless the defendant or his counsel specifically asks that it be revealed. The Supreme Court of Pennsylvania has not yet ruled. *Compare* Cherry v. State, 9 Md. App. 416, 264 A.2d 887 (1970); State v. DeBonis, 58 N.J. 182, 276 A.2d 137 (1971) (*Pearce* applicable as a matter of state public policy). A similar inquiry involves jury resentencing. Since the slate is clean, increased sentencing is constitutionally permissible without affirmative reasons on the record. *See* Chaffin v. Stynchcombe, 412 U.S. 17 (1973). Except for imposition of the death penalty on a charge of first degree murder, there are no offenses for which sentence is imposed by the jury.
808. North Carolina v. Pearce, 395 U.S. 711 (1969).

tence or for a period longer than the original term is not a violation of the double jeopardy clause.[809] This is true even if trial of the offense upon which a revocation is based resulted in an acquittal.[810] Of course, an order placing a defendant on probation constitutes punishment for double jeopardy purposes.[811] Thus a court may not increase a term of probation, without a revocation, but may modify the order or state a new sentence if the terms thereof are violated or conditions are not met.[812]

Sentencing a recidivist more harshly than a first offender is not viewed as an additional penalty for earlier crimes, but rather as a penalty for the most recent offense which is aggravated because it is repetitive.[813] Of course, such multiple or habitual offender sentencing must be done at the time of sentence imposition.[814] Statutes which allow recidivist resentencing any time after conviction of the new offense would be held to be unconstitutional.[815]

809. Commonwealth v. Cole, 222 Pa. Super. 229, 297 A.2d 824 (1972); Commonwealth v. Johnson, 222 Pa. Super. 233, 294 A.2d 778 (1972).

810. Commonwealth v. Kates, 452 Pa. 102, 305 A.2d 701 (1973).

811. Commonwealth v. Vivian, 426 Pa. 192, 200, 231 A.2d 301 (1967).

812. Commonwealth v. Mirra, 220 Pa. Super. 393, 281 A.2d 773 (1971); United States *ex rel.* Vivian v. Bookbinder, 286 F. Supp. 10 (E.D. Pa.), *aff'd*, 403 F.2d 156 (1968).

813. Gryger v. Burke, 334 U.S. 728 (1948).

814. *See, e.g.*, Pennsylvania Habitual Criminal Act, Act of June 3, 1971, P.L.—, No. 6, § 1, [1971] (repealed 1973) (two years after final sentence to impose recidivist penalty).

815. *See* United States v. Benz, 282 U.S. 304, 307-09 (1931); *Ex parte* Lange, 85 U.S. (18 Wall.) 163 (1873).

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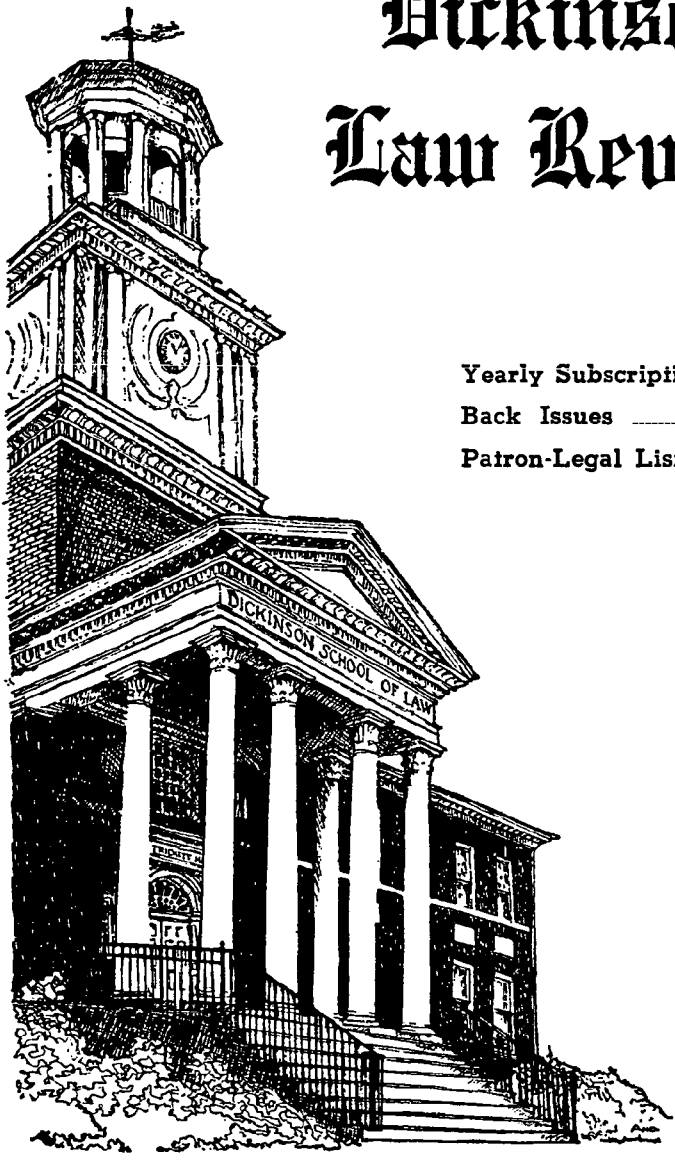

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